Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

APPENDIX

Volume I

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 21, 1977
CERTIORARI GRANTED OCTOBER 11, 1977

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VOLUME I

RELEVANT DOCKET ENTRIES

United States District Court for the Northern District of Georgia

(Title omitted in printing)

Civil Docket

Date		
1973		
Apr.	16	Complaint, filed.
May	8	Consent Order by Clk. ext. time thru 6/8/73 for deft. to answer, etc. to the complaint, filed. Copies furn.
June	8	Answer, filed.
1975		
May	1	Motion of NBMA for partial summary judgment with statement of material facts and brief, filed. (Exhibits to go with this filed in separate envelope—5/13/75) In vault.
		Affidavit of Bob M. Anthony, filed.
		Affidavit of Irston R. Barnes, filed.

Affidavit of Ford Barrett, filed.

Affidavit of J. Troy Copeland, filed.

Affidavit of Kirk H. Davis, filed.

Affidavit of Dr. Verner G. Hurt, filed.

Affidavit of Richard C. Larkin, filed.

Affidavit of Maurice B. Layton, filed.

Affidavit of Albert B. Maddox, filed.

Affidavit of James Archie Martin, filed.

Affidavit of Leroy Emerson Mayfield, filed.

Affidavit of H. F. McCarty, Jr., filed.

Affidavit of William T. O'Neal, filed.

Affidavit of A. C. Smith, filed.

Affidavit of Thomas W. Sparks, filed.

(Above affidavits sealed and in vault.)

May 2 Stipulation waiving all objections with respect to authenticity and hearsay to admission in evidence of attached documents, etc., filed.

June 10 Pltf's Cross Motion for Partial Summary Judgment, filed. Pltf's Statement of Material Facts, filed.

Pltf's Statement of Material Facts Submitted by NBMA as to Which There is a Genuine Issue to be Tried, filed. Pltf's Objections to the Admissibility of Affidavits Submitted by NBMA in Support of its Motion for Partial Summary Judgment, filed.

Pltf's Brief in Support of its Cross Motion and in Opposition NBMA's Motion for Partial Summary Judgment, filed.

Contracts of NBMA Members (submitted by pltf in support of its cross-motion for partial summary judgment), filed.

Stipulation, filed.

June 23 Deft's Response to Govt's cross-motion and opposition to deft's motion for partial summary judgment, filed. (To AJH 6/23)

Deft's Statement of Material Facts Not in Dispute, filed. (To AJH)

Deft's Reply to Govt's Statement of Material Facts. filed. (To AJH)

Affidavit of Ronald M. Cameron, filed. (To AJH)
Affidavit of Collier Wenderoth, filed. (To AJH)
Pltf's Errata re: Statement of Material Facts, filed. (To AJH)

Aug. 26 Order granting deft's motion for partial summary judgment and denying pltf's cross motion for partial summary judgment, filed. (copy to counsel)

1976

Feb. 26 Pltf's Amended Complaint, with stipulation by parties agreeing to this filing; that Govt's statement of Material Facts filed 6/6/75 and deft's statement of material facts not in dispute filed 6/20/75, are not in dispute; that pltf shall not be precluded from filing a separate action at any time and Order by AJH Allowing amended complaint, filed. (Copies furn.)

Mar. 9 Deft's Motion for Summary Judgment, with Memorandum, filed. (To AJH)

Govt's Response to Deft's Motion for Summary Judgment, filed. (To AJH)

Answer to Amended Complaint, filed. (To AJH by law clerk not orig file)

Mar. 16 Order Granting deft's motion for summary judgment and pltf's amended complaint be dismissed with prejudice, filed. c. furn.

Final Judgment filed and entered that pltf's amended complaint be dismissed with prejudice, that deft. is declared and adjudged a duly organized cooperative association—etc., that deft. recover of the pltf. its costs of action. c. furn.

Apr. 19 Notice of Appeal, filed.

United States Court of Appeals
For the Fifth Circuit

(Title omitted in printing)

Filings

Date

1976

Apr. 26 Appeal docketed.

June 1 Record on appeal, filed.

1977

Apr. 22 Opinion and Judgment of United States Court of Appeals for the Fifth Circuit, filed.

In the United States District Court for the
Northern District of Georgia
Atlanta Division

(Title omitted in printing)

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

(Filed June 23, 1975)

References to statements by each of the parties bearing on the facts set out below are given at the conclusion of each numbered statement. The following reference code is used:

"DF-"—Statement of Material Facts Submitted by NBMA as to Which There Is a Genuine Issue to Be Tried, filed by the Government on June 6, 1975.

"GF-"—Government's Statement of Material Facts, filed by the Government on June 6, 1975.

"NBMA F-"—Statement of Material Facts filed by NBMA on May 1, 1975.

"Rogers 5/9 Letter"—Letter from George B. Rogers to Charles S. Stark dated May 9, 1975 and attached to the Stipulation filed herein dated June 6, 1975.

"M-"—Contracts of NBMA Members, individually numbered and filed under seal by the Government on June 6, 1975.

"Table G-"—Tables attached to Affidavit of Irston R. Barnes filed by NBMA on May 1, 1975.

"Admission ¶"—Plaintiffs' Response to Defendants' First Request for Admission of Facts.

"Errata"—Errata statement submitted by the Government and dated June 19, 1975, correcting errors in various items filed of record by the Government on June 6, 1975.

Cn the basis of the filings to date by the parties with respect to the material facts, the following facts are not disputed by either party:

1

NBMA was organized and chartered by the State of Georgia on September 15, 1970, as a non-profit cooperative association pursuant to the provisions of the Georgia Cooperative Marketing Act, Georgia Code Ann. § 65-201 et seq., which authorizes cooperative associations of "persons engaged in the production of agricultural products" (Georgia Code Ann. § 65-205). DF-1; NBMA F-1; GF-1.

2

NBMA was originally organized and chartered as a cooperative association with capital stock. On December 6, 1973, the Articles of Incorporation were amended to authorize cancellation of the association's capital stock and conversion of the association to a non-profit membership cooperative association not having stock. DF-2; NBMA F-2.

3

NBMA has been operated at all times for the mutual benefit of its members. DF-3; NBMA F-3.

4

No member of the association has been allowed more than one vote at any time. DF-4; NBMA F-4.

5

The association has at no time paid dividends on stock or membership capital in excess of 8 percent per annum. DF-5; NBMA F-5.

6

Unless it is determined that broilers placed by NBMA members with contract growers are the "products" of the growers and not the NBMA members, NBMA has not dealt in the products of non-members to an amount greater in value than such as have been handled by it for members. DF-6; NBMA F-6.

7

The association has been conducted at all times on a non-profit cooperative basis. DF-7; NBMA F-7.

8

NBMA serves its members through cooperative marketing and cooperative purchasing activities on behalf of its members. DF-8; NBMA F-8.

9

The RTC broiler is an agricultural product. DF-15; NBMA F-15.

10

More than 95% of all broiler chickens marketed in the United States are first marketed as processed, ready-to-cook (RTC) broilers. DF-14; NBMA F-14.

11

The production of RTC broilers involves (a) the placement, raising and breeding of breeder flocks to produce eggs to be hatched as broiler chicks, (b) the hatching of broiler eggs and placement of broiler chicks, (c) the raising of broiler chicks for a period of seven to nine weeks, (d) the catching, cooping and hauling of the grown-out broiler chickens to processing facilities, and (e) the operation of facilities to process and prepare the RTC broilers for market. DF-16; NBMA F-16.

12

Most NBMA members (or firms they own or are commonly owned with) own and operate processing plants in which broilers are slaughtered and dressed for market, feed mills, breeder flocks for the production of broiler eggs, and hatcheries in which the eggs are hatched to become day-old chicks from which broilers are raised. Six members do not own or control breeder flocks or hatcheries, but purchase chicks from outside sources. One owns a hatchery but does not own or control a breeder flock. Six members do not own or control feed mills, but purchase feed from outside sources. Four members do not own or control any broiler processing facilities; their processing is done through a contractual relationship with another company. Two members do not own or control breeder flocks, hatcheries or feed mills. GF-2; Errata, p. 1.

13

All NBMA members accomplish the growout of some or all of their broiler chickens (raising the chickens from day-old chicks to seven-to-nine-week-old chickens) through contractual arrangements with independent contractors, known as growers, whereby the contracting growers provide certain facilities and services necessary to care for the chickens. DF-19; GF-3; NBMA F-19, DF-22.

14

Of the 57 grower contracts in use by NBMA members and former members in the record on this motion pursuant to the June 6, 1975 Stipulation, 54 vest ownership of the broiler chickens solely in the members. GF 18(h); contracts of NMBA members.

15

One of the three remaining contracts (M-46) provides that the member and the grower shall have "joint ownership". GF 18(h).

16

Another of the remaining contracts (M-47) provides that the member agrees "to sell broiler chicks" and "to sell to Grower the necessary feed, vaccines, medications, and sanitation products necessary to raise said birds to processing age". The M-47 contract further provides as follows:

> "In the event of death of the birds at any time prior to the time they are picked up from the Grower's premises, Grower assumes any losses due to the expenditure of labor, use of land, facilities, equipment, and the cost of any fuel or litter. [Member] assumes the loss of the cost of the chicks, feed, and other materials supplied by [Member]."

17

The final contract is the one in use by member M-27. Member M-27 is a grower-owned cooperative, whose members include persons engaged in growing broiler chickens which are processed and marketed cooperatively through their association. The M-27 contract with its members states, in pertinent part, as follows:

> "This is an agreement between [Member], a farmers' cooperative purchasing and marketing association, and . . . . . ('Producer').
>
> "[Member] acts for its producer members in manufacturing, purchasing or otherwise obtaining for its producer-members and furnishing to them, baby chicks, feed, vaccines, medicines, and other supplies necessary for the production of broilers."

18

With respect to the growout phase of their broiler operations:

(a) All NBMA members supply the chicks, make all decisions with respect to the number and timing of chick placements,

and choose the breed or type of broiler to be produced; DF-22 (a) and (d); Errata, p. 3; NBMA F-22(a) and (d).

(b) All NBMA members supply the feed and make all decisions with regard to diet and type of feed; DF-22(b) and (j); Errata, p. 3; NBMA F-22(b) and (j).

(c) All NBMA members supply the medicines, vaccines and other health supplies. DF-22(c); NBMA F-22(c).

(d) Fieldman or supervisors employed by all NBMA members visit the growout houses (generally once a week) to assure that the grower is competently raising the birds. GF-8; DF-22(e); NBMA F-22(e); Table G-3.

(e) All NBMA members supply all veterinary services during the growout period. DF-22(g); NBMA F-22(g).

(f) All NBMA members transport the chickens and feed to the growers, and transport the grown-out chickens from the growers to the processing plant. DF-22(h); NBMA F-22(h).

(g) All NBMA members provide the equipment and all provide some, most provide all, of the labor, for catching, cooping and loading the live birds. DF-22(i); NBMA F-22(i); Table G-3.

(h) All NBMA members make all decisions with regard to the age and size at which birds shall be marketed. DF-22(k); NBMA F-22(k).

19

The only phase of broiler production requiring any investment by the contract broiler grower is the broiler growout phase. DF-25; NBMA F-25.

20

The contract grower's risk of investment in broiler production is limited to the value of his investment in the facilities (land, buildings and equipment), services and utilities (heating fuel and

electricity) and in some cases other supplies such as litter, used in the growout phase. DF-26; NBMA F-26.

21

The grower's risk of loss of his buildings and equipment is insurable. DF-27; NBMA F-27.

22

The only farm land owned by individual growers which is devoted to the raising of broilers is the land underlying the broiler houses and the area required for a roadway to the houses. DF-28; NBMA F-28.

23

The land requirement for housing and raising a typical broiler flock (10,000 to 45,000 birds) is less than 5 acres. DF-29; NBMA F-29.

24

A recent survey indicates that during the period 1972-74 an average broiler grower in the South incurred costs of 1.64 cents per salable liveweight pound in connection with the raising of a flock of broilers under contract. The same survey indicates that an average broiler contractor, or integrator, incurred costs of 22.47 cents per salable liveweight pound in production of the same broiler. GF-14; Table titled "Broiler Production Costs and Efficiency, Southern and Northeastern Regions, 1972-1974," attached to Rogers 5/9 Letter (hereinafter referred to as "Rogers Table").

25

The 1.64 cent average grower cost in the survey includes both fixed and variable costs incurred by the growers. The 22.47 cents average contractor cost includes only the costs associated with feed, chicks, grower payment, medication, vac-

cination, fuel, litter, administration, field supervision, insurance, and miscellaneous. No processing costs or costs associated with depreciation on capital investment, interest, repairs and maintenance, taxes or other fixed cost expenses are included in the total contractor cost average. Rogers Table and Table footnote 5.

26

The survey indicating a 1.64 cent per salable live weight pound average grower cost also indicated a 2.30 cent per salable live weight pound average grower payment.

While broiler growers in the south included in the survey were thus averaging a 40% return during the 1972-74 period, annual net returns to broiler integrators (nationwide) averaged as follows, according to estimates by the USDA Economic Research Service:

Years	Returns (based on lagged feed prices)	Returns (based on contemporaneous feed prices)
1972	-0.1 $/lb.	-0.8 $/lb.
1973	2.6 $/lb.	1.6 $/lb.
1974	-2.0 $/lb.	-2.3 $/lb.

Rogers Table; Rogers 5/9 Letter and two annual net returns tables attached thereto.

27

An integrated broiler firm that processes and markets 40 million birds per year, a "medium" size firm, may have facilities for raising breeder flocks, a hatchery and processing facilities having a present replacement value of some what less than $8 million. Growers associated by contract with the firm may have an aggregate investment in broiler houses and equipment in which the 40 million broilers a year are raised of approximately 9.2 million, with a present replacement value of the same buildings and equipment as much as 50% greater. GF-5.

28

Applying the average figures for broiler production in the South, 1972-74 (Rogers Table), the integrated broiler firm's annual investment in variable production costs with respect to the 40 million birds referred to in the next preceding paragraph would amount to approximately $34 million (22.47 x 3.77 [average live weight pounds per bird] x 40 million = $33,884,760). The annual aggregate investment of all growers associated with the firm in the production of 40 million birds would amount to approximately $2.5 million (1.64 x 3.77 x 40 million = $2,473,120). GF-5; Rogers Table.

29

The *absolute* amount of fixed costs incurred by contractors exceeds grower fixed costs. Rogers 5/9 Letter.

30

During the period 1972-1974, mortality during the grow-out phase of broiler production among southern broiler flocks surveyed averaged 3.26%. Rogers Table.

31

Approximately 90% of the live bird cost of producing broilers is accounted for by inputs supplied by the broiler integrator including feed, chicks, medications, veterinary supplies and services, grow-out supervision, transportation and labor for catching, cooping and hauling. DF-31; NBMA F-31.

32

More than half of the live bird cost is accounted for by feed costs alone. DF-32; NBMA F-32.

33

The broiler integrator, rather than the contract grower, is the purchaser of feed or feed ingredients on the open market. DF-33; NBMA F-33.

34

The broiler integrator is the seller of broilers on the open market and bears a risk of fluctuations in prices for RTC broilers due to market conditions. DF-34; NBMA F-34.

35

The broiler integrator, who sells broilers on the open market, has no guarantee of any return and therefore risks all of his investment in the production and marketing of broilers. DF-35; NBMA F-35.

36

The development of commercial broiler production came about at the initiative of integrators, who began as growers, hatcherymen, feed dealers, feed manufacturers or broiler processors and over time undertook risks of investment in feed, chicks and supplies and risks of marketing the product. For purposes of this motion, NBMA does not contest the Government's assertion that NBMA members have not assumed all of the risk of investment in feed, chicks and supplies or all of the market risk in the sale of broilers. DF-38; NBMA F-38.

37

The broiler market in which the integrators sells has all the characteristics of the typical agricultural market. The product is perishable and is produced through a biological process; once production is committed, the integrator must either sell his product or destroy it; pricing is characterized by volatility and instability, a characteristic which is harmful to producers; and the product is distributed through middlemen intervening between the integrator and the consumer. DF-45; NBMA F-45.

38

The market conditions under which RTC broilers are produced and marketed are typical of conditions in agricultural

markets generally, and in some cases even more difficult for producers to cope with than conditions with respect to other commodities. Broilers are a perishable commodity, and must be marketed regardless of demand; the sellers are scattered and uninformed with respect to inventories and demand, and the market is consequently highly susceptible to overproduction; the demand is seasonal and cyclical; the market price fluctuates weekly; and the market is dominated by concentrated buyers. DF-46; NBMA F-46.

39

Historical patterns and trends in demand for broilers are frequently modified by unanticipated and unforeseeable occurrences, such as retail price specials, fluctuations in supplies and retail prices for beef and pork, weather conditions, labor strikes, and variations in broiler production levels. DF-48; NBMA F-48.

40

Production decisions for integrators who own or control breeder flocks begin as much as 18 months before the product of those decisions reaches the market, with the decisions relative to placement of breeder chicks. DF-49; NBMA F-49.

41

Production adjustments after breeder chicks are placed require either (i) removing some breeder hens from production (for those integrators who own or control breeder flocks); (ii) diverting breeder chick eggs from production prior to hatching (for those integrators who own or control breeder flocks); or (iii) destroying the broiler chicks after hatching but prior to placement for the grow-out (for those integrators who own or control hatcheries). DF-50; NBMA F-50.

42

A decision to cut back production using any of the methods described in the preceding paragraph requires the sacrifice of

the integrator's investment in connection with the laying flock and the hatchery up to the point of decision and removal from production. DF-51; NBMA F-51.

43

The final opportunity for adjustments in the broiler integrator's production—the time when broiler chicks are placed for the grow-out—comes approximately 8 weeks prior to the day on which the broilers will be ready for slaughter and must be marketed. DF-52; NBMA F-52.

44

Fresh broilers are highly perishable. DF-53; NBMA F-53.

45

In commercial practice, chilled (non-frozen broilers) must be sold to the ultimate consumer within 7 to 10 days of slaughter. Because of this limited shelf life, broiler integrators must sell all their fresh product within a maximum of 4 days from time of slaughter. DF-54; NBMA F-54.

46

More than 90% of all federally inspected RTC broilers are sold in fresh (non-frozen) form. DF-55; NBMA F-55.

47

Broilers are produced through a biological process, and once production is committed by the integrator, he must either sell his product or destroy it. DF-56; NBMA F-56.

48

The demand for broilers is for birds in a fairly narrow weight range from approximately 2 to approximately 3½ pounds dressed weight. DF-57; NBMA F-57.

49

Broiler chickens which are not slaughtered when they reach market weight continue to increase in weight beyond desirable levels. Birds exceeding the desirable weight must normally be sold at a discount below prevailing price levels for desirable weight birds. DF-58; NBMA F-58.

50

Broiler chickens which are not slaughtered when they reach desirable market weight remain in the field consuming feed and increasing production costs incurred by the integrator. DF-59; NBMA F-59.

51

Consumer demand for broilers fluctuates from week to week, with peaks and valleys in demand occurring in connection with, among other things, holidays and seasons of the year. DF-60; NBMA F-60.

52

Broilers are produced continuously, however, with little leeway in the timing of their slaughter. When supplies build up, the broiler integrator must find retail buyers, because no important alternative outlet is available for the diversion of surplus supplies. DF-61; NBMA F-61.

53

Most broiler integrators are dependent on certain retailers purchasing their product every week. Because of the perishability of the product, the broiler integrator must sell his product quickly, if not to his regular account, then to a hurriedly found substitute. DF-62; NBMA F-62.

54

A retailer's use of promotional price specials causes fluctuations in his customers' demand for broilers; thus, the retailer has much greater latitude in determining how much chicken to buy than the seller has in determining how much to produce for sale. DF-63; NBMA F-63.

55

Retail merchandising policies and practices strongly influence short-run demand faced by individual broiler integrators. Retail specialing, for example, creates large product demands during special weeks but greatly reduced demands during non-special weeks. DF-64; NBMA F-64.

56

For broiler integrators regularly dependent upon selling large volumes to certain customers, fluctuating retail requirements can cause them to be burdened periodically with heavy inventories. DF-65; NBMA F-65.

57

When unsold supplies pile up, sellers find themselves in rapidly deteriorating bargaining positions, forcing them to sell at prices below current market levels. DF-66; NBMA F-66.

58

Integrators often market their product at prices insufficient to return to them their cost of producing the broilers, and the broiler market during several recent years has been characterized by violent swings within the year. DF-67; NBMA F-67.

59

During the 39 months covered by the Complaint (January, 1970 through March, 1973), USDA Economic Research Service analysis of net returns to broiler integrators on an aggregate basis indicated losses for 21 of those months, with a positive net return in only 18 of those months. DF-68; NBMA F-68.

60

On an aggregate basis, monthly net losses during the period were as high as 5.44 cents a pound, averaging 1.69 cents per pound. The highest net positive return for the period was 4.77 cents per pound, with an average of 1.02 cents per pounds for all months showing positive returns. DF-69; NBMA F-69.

61

Violent swings in day-to-day or week-to-week purchases create substantial problems for producers of agricultural products, and create particular problems for the broiler industry. The product is perishable; it has to be moved in a relatively short period of time and cannot be stored and held; and the production process for broilers is such that the flow of product cannot be varied substantially from day to day once the decision has been made to produce at a certain rate over time. DF-70; NBMA F-70.

62

Integrated broiler production has developed in areas of limited alternative agricultural enterprise, and has replaced or supplemented incomes received by rural families from other sources. DF-73; NBMA F-74.

63

NBMA's members and other integrated producers have investments in land, buildings and equipment for hatcheries, feed mills or processing plants, or some combination of those functions. DF-23; NBMA F-23.

64

In the production and marketing of their broilers, NBMA members and other integrated broiler producers have an investment in some if not all, of the following: Hatchery, hatchery supply (breeder) flock, feed or feed ingredients and feed mill, growout supplies, chicks, processing facilities and the labor necessary to process the RTC broiler for market. DF-24; NBMA F-24.

Dated: June 20, 1975.

Respectfully submitted,

/s/ SIDNEY O. SMITH, JR.
/s/ MICHAEL A. DOYLE
/s/ FREDERICK H. VON UNWERTH
/s/ PETER KONTIO

Of Counsel:

ALSTON, MILLER & GAINES
1200 C&S National Bank Building
Atlanta, Georgia 30303
(404) 588-0300

Of Counsel:

MILTON H. MITCHELL
CARTER, MITCHELL & ROBINSON
P. O. Box 2216
Jackson, Mississippi 39201

In the United States District Court
For the Northern District of Georgia
Atlanta Division

(Title omitted in printing)

GOVERNMENT'S STATEMENT OF MATERIAL FACTS

(Dated June 6, 1975)

The following Statement of Material Facts is submitted in support of the Government's Cross-Motion for Partial Summary Judgment. The facts set forth in this Statement are based largely on materials obtained from the defendant, and we believe they are not in dispute. The sources in the record that support each fact are cited herein as follows:

Affidavits filed by NBMA in support of its motion are referred to by the last name of the affiant and the paragraph in the affidavit to which references is made.

"NBMA F-[numeral]" refers to a statement contained in NBMA's Statement of Material Facts. The numeral indicates the numbered statement to which reference is made.

"June 6, 1975 Stipulation" refers to a Stipulation of that date filed by counsel to the parties.

"Rogers 5/9 letter", "Rogers 5/23 letter" and "GX-1" refer respectively to the letters of May 9, 1975 and May 23, 1975 from Dr. George B. Rogers of the Economic Research Service of the U.S. Department of Agriculture to Charles S. Stark, and GX-1 refers to a table of information concerning NBMA members, all of which are attached to and made part of the record in accordance with the June 6, 1975 Stipulation.

"M-[numeral]" refers to an NBMA member's grower contract. The contracts have been filed with the court under seal, pursuant to the Protective Order of December 27, 1973, and are made part of the record in accordance with the June 6, 1975 Stipulation. Facts that are true of members' contracts generally are referenced to "Contracts generally."

"Table G-[numeral]" refers to one of the tables attached to and made part of the affidavit of Irston R. Barnes, submitted by NBMA in support of its Motion.

1. The National Broiler Marketing Association (NBMA) is an organization of firms engaged in the marketing of broiler chickens. The Association was chartered on September 15, 1970, and began operation later that year. Seventy-eight firms are, or have at some time since the organization of the association, been members of NBMA. (NBMA's Statement of Materials Facts, ¶ 1; Defendant's Ans. to Plaintiff's Second Interrogatories, Ans. to Int. 6).

2. Most NBMA members (or firms they own or are commonly owned with) own and operate processing plants in which broilers are slaughtered and dressed for market, feed mills, breeder flocks for the production of broiler eggs and hatcheries in which the eggs are hatched to become day-old chicks from which broilers are raised. However,

(a) At least 6 members do not own or control breeder flocks or hatcheries; they purchase chicks from outside sources. One additional member does not own or control breeder flocks, but does have a hatchery.

(b) At least 6 members do not own or control feed mills; they purchase feed from outside sources.

(c) At least 4 members do not own or control any broiler processing facilities; their processing is done through a contractual relationship with another company.

(d) Two members do not own or control breeder flocks, hatcheries or feed mills. (Table G-1; June 6, 1975 Stipulation, ¶ 3)

3. In most cases, the broilers that are marketed by NBMA's members are raised by independent growers on their own land, in their own buildings and equipment and with labor they perform or furnish, under contractual arrangements with the member firms. At least 32 members do not own or operate any farms on which broilers are raised, including two members who do not own or control any breeder flocks, hatcheries or feed mills, either. Of the remaining members for which information is available, all but three rely on independent contract growers for the production of at least eighty percent, and usually more, of the broilers they market. One member relies on contract growers for 47.3% of the broilers its markets, and two members raise all of the broilers they market on their own farms. (Table G-1; GX-1)

4. Broiler growers, with whom NBMA's members contract for the production of broilers, are independent farmers who have substantial investments in land, buildings and equipment devoted to the production of broilers. A recently conducted survey indicates that a broiler grower in the South who produces 30,000 broilers per flock (or 135,000 broilers a year, since an average grower raises 4½ flocks a year), a typical figure, has an average investment in broiler houses and equipment of approximately $31,200, which does not include the value of the land under and around the broiler houses. This figure is an average of the costs of buildings and equipment of various ages, and the present replacement value of the same buildings and equipment is as much as 50% greater. (NBMA F-19; Rogers 5/23 letter; McCarty ¶ 39; Sparks ¶ 16; Smith ¶ 34)

5. A broiler firm that processes and markets 40 million birds per year, a "medium" sized firm, may have facilities for raising breeder flocks, a hatchery and processing facilities having a present replacement value of less than $8 million. By contrast, the aggregate investment of growers in broiler houses and equipment needed to raise 40 million broilers a year is approximately $9.2 million, and the present replacement value of the same

buildings and equipment is as much as 50% greater. (Hatfield Dep. p. 12 lines 18-25, p. 14 line 15, p. 15 line 10, p. 15 lines 21-22, p. 16 line 1, p. 18 line 3, p. 42 line 1, p. 44 line 23; Paragraph 5, *supra*)

6. The contracts entered into between NBMA's members and broiler growers usually provide that:

(a) The grower furnishes his land, buildings and equipment, water, electricity and all labor needed to raise the broilers from day-old chicks to birds of marketable size and weight;

(b) The member furnishes the chicks and the feed and health supplies to be used in raising the birds. (Barrett ¶ 28; Copeland ¶ 25; Davis ¶ 30; Layton ¶ 31; Maddox ¶ 24; Martin ¶ 32; Mayfield ¶ 40; O'Neal ¶ 36; Sparks ¶ 37; McCarty ¶ 29; Contracts generally)

7. Contracts of 9 members require the grower to be present and assist in the catching and loading of the grown-out birds. (M-9, 11, 19, 32, 47, 49, 51, 58, 64)

8. In most contract growing arrangements, a serviceman employed by the member firm visits the grower's farm roughly once a week to assure that the grower is competently raising the birds. The day-to-day management of the flock is handled by the grower. (Smith ¶ 43; M-39; M-41; Contracts generally)

9. Contracts used by at least 29 of NBMA's members expressly provide that the grower is an independent contractor, or state that the grower is in no way an agent, employee or partner of the member firm. One present member's contract provides that:

> [I]t is expressly understood and agreed that Grower in the performance of his duties is not subject to the control or supervision of [member] but as an independent contractor responsible only for the results of his services and covenants contained herein. (M-41)

Another member's contract provides that:

> [T]he producer [grower] shall perform this contract as an independent contractor free of control by owner [member] as to the details of the work to be done and accomplished by the producer . . . [N]or shall the fact of . . . services being offered to the producer [by the member] be construed to be or indicate a right on the part of the owner to control the details of the manner in which producer performs the work to be done or accomplished under this agreement. (M-39)

(M-6, 7, 9, 10, 12, 14, 22, 23, 26, 31, 35, 37, 38, 39, 41, 42, 46, 47, 49, 50, 51, 52, 54, 56, 57, 58, 60, 61, 63)

10. Usually the contracts provide for a minimum and a maximum payment per pound or per bird. Contracts used by 51 members do not guarantee any payment to the grower for birds that die because of disease or weather before they reach marketable age. Many members say that in practice they do not pay growers for birds that die as a result of such causes. (GX-1; Table G-2; Table G-4)

11. Contracts used by NBMA members include the following provisions for determining the amounts paid to the grower, between the specified minimum and maximum payments for live broilers:

(a) Under the contracts used by 23 members, the amount received by the grower depends on the market price of broilers. (Table G-4; Contracts of members having "market clause");

(b) Under the contracts used by 50 members, the amount received by the grower for raising a flock of broilers depends on the amount of feed furnished by the member in connection with that flock, so that the more feed the birds consume per pound of live weight, the less the grower receives (Table G-4; Contracts of members having "efficiency differential");

(c) Under the contracts used by 25 members, the payment received by the grower depends upon the cost per bird of per pound of the chicks and other supplies or services furnished by the member, as well as feed, so that the greater the cost per bird or per pound of the inputs furnished by the member the less the grower receives (M-6, 9, 12, 19, 21, 23, 27, 29, 31, 34, 35, 37, 39, 42, 46, 49, 50, 51, 53, 57, 58, 59, 61, 62);

(d) Under the contracts used by 7 members, having payment provisions of the type described in subparagraph 10(c) above, the payment to the grower is diminished or increased cent-for-cent by the amount the cost of member-supplied inputs is more or less than the average cost of inputs furnished to other growers (M-6, 23, 29, 31, 47, 50, 58);

(e) Under the contracts used by 2 members, the amount received by the grower depends on the current price of feed or feed ingredients, so that as the price of feed or feed ingredients goes up the grower gets less (M-9, 53);

(f) One member's contract provides that feed will be billed to the grower at a profit margin to the contractor. (M-17)

12. Responsibility for payment for heating fuel used in growing broilers normally rests with the grower. Of 54 present and former members for which information is available, 15 reimburse the grower for all or part of his fuel costs. Barnes ¶ 30; Table G-3)

13. Litter used in the growing of broilers is normally paid for by the grower. Of 54 present and former members for which information is available, 36 do not supply or pay for litter, 15 do supply or pay for litter and two members supply litter to one group of growers but do not supply litter to two other groups of growers with whom it contracts. (Barnes ¶ 31; Table G-3)

14. A recent survey indicates that during the period 1972-74 an average broiler grower in the South incurred costs of 1.64¢ per pound in raising a flock of broilers. At least 21 members guarantee broiler growers less than 1.64¢ per pound. A grower contracting with any of those members has no assurance that he will recover enough on a flock of broilers to pay the expenses he incurs in raising the flock, let alone any return for his labor, even if the entire flock survives to marketable size and weight. (Table G-4)

15. NBMA members are free to lower the payment scale (or other terms) in their contracts with growers before a flock is started, in response to rising feed costs or falling market prices for broilers. Two members' contracts expressly provide that "[Members] reserves the right to change pay schedule if economic conditions so warrant." (M-5, M-13) The record in this case includes two instances during the recent period in which members have reduced payments to growers for one or more flocks in response to these conditions, in one instance by 45%. (McCarty ¶ 15; M-38; M-53)

16. Contracts used by NBMA members usually do not obligate the member to place with the grower any specified number of flocks per year, or any specified number of chicks per flock. Members are thus free to vary the number of flocks or chicks placed with growers, or the length of time between flocks, in accordance with their projected marketing requirements. Accordingly, growers have no assurance of continuous revenues from the raising of broilers. (Table G-8; Barnes ¶ 50: Contracts generally)

17. Contracts used by NBMA members usually may be terminated by the member (upon notice) after any flock. NBMA members can and do terminate their dealings with individual broiler growers for a variety of reasons, including the grower's purported inefficiency, the member's dissatisfaction with the grower's facilities, the member's decision to cut back on the number of growers with whom it will deal, or the member's determination that the grower is located too far from the mem-

ber's facilities. While in some cases a grower who is cut off may be able to contract with another firm, in other instances there is no other broiler contractor in the area competing for growers. Thus, the grower has no assurance of continued revenues to support his investment in broiler raising facilities. (Contracts generally; GX-1; Table G-7)

18. Among NBMA's present and former member are firms whose contractual arrangements with broiler growers include the following provisions:

(a) A requirement that the grower pay all taxes on the birds, feed, grit, litter, fuel and sanitation products (M-23);

(b) A provision requiring the grower to pay for all chick losses in excess of 5% (M-11);

(c) A provision under which the grower is obligated to pay damages to the member in the event birds die as a result of fire caused by the grower's negligence (M-42);

(d) A provision that in the event of fire or natural disaster, any feed losses are to be split between the grower and the member (M-57);

(e) A provision that the grower will bear the risk of loss from theft, his own or his agent's negligence, or from his failure to practice sound poultry management (M-10);

(f) A provision that the grower will pay for the catching and loading of the birds, subject to partial or full reimbursement if the member makes a profit on the sale of the birds (M-17);

(g) A provision requiring the grower either to assist in catching and loading the birds or to pay the member for the service (M-51);

(h) Provisions giving the grower title to the birds (M-27, 47), or sharing title between the member and the grower (M-46);

(i) A provision that the grower will bear any losses resulting from the use of pesticides (M-50);

(j) A provision under which the grower is to hold the member harmless from and indemnify him "against any and all claims, suits, demands or actions arising in any manner from the operation of [the grower's] premises," other than those arising from the member's acts (M-52);

(k) Provisions under which the member sells the chicks to the grower (M-46, M-47);

(l) A provision establishing ownership of feed and supplies, as well as chicks, in the grower. (M-27)

19. Other provisions of members' contracts are indicative of the parties' roles. For example, the contract used by one member, itself a cooperative, states:

> [Member] acts for its producer members in manufacturing, purchasing or otherwise obtaining for its producer members, and furnishing to them, baby chicks, feed vaccines, medicines, and other supplies necessary for the production of broilers. [Member] also acts for its producer member in furnishing management advice in the production of broilers for market, and further acts for such producer members in the processing and marketing of broilers and other agricultural commodities produced by such members. Producer is engaged in the business of raising broilers for market. (M-27)

Another member's contract begins,

> [Member], in order to enable the grower to engage in the production of broilers, hereby delivers to Grower one certain lot of [chicks]. It is distinctly understood and agreed that said chicks shall at all times remain the property of [member] until such time that the grower can repay [member] or other lending institution for any loan ad-

vanced for the particular purpose of growing this lot of chicks from the age of day-old to a stage which will qualify them, to be sold as broilers-fryers. (M-36)

Another member's contract begins,

[W]hereas, Dealer [member] deals in poultry and supplies and is the owner of the broiler chicks hereinafter mentioned, which are sometimes also referred to as 'chicks' and as 'broilers', and whereas, grower is engaged, among other things, in raising poultry. . . . (M-7)

Respectfully submitted this 6th day of June, 1975.

/s/ CHARLES S. STARK
/s/ LARRY R. PATTON
/s/ ELLIOT R. WARREN
Attorneys, Department of Justice
Washington, D.C.

In the United States District Court for the Northern District of Georgia, Atlanta Division

(Title omitted in printing)

ERRATA

(Dated June 19, 1975)

Plaintiff hereby amends its Statement of Material Facts, Statement of Material Facts Submitted by NMBA as to Which There is a Genuine Issue to be Tried, Brief in Support of its Cross Motion and in Opposition to NMBA's Motion for Partial Summary Judgment, and the Stipulation filed June 6. 1975, to incorporate the following corrections:

Government's Statement of Material Facts

At p. 1, second line from the bottom, "letter" should read "letters".

At p. 2, fifth line from the bottom, "market;" should read "market,".

At p. 3, the first subparagraph at the top of the page should read:

"(a) At least 6 members do not own or control breeder flocks or hatcheries; they purchase chicks from outside sources. One additional member does not own or control breeder flocks, but does have a hatchery."

At p. 3, numbered paragraph 3 should read, from the beginning of the third sentence in the paragraph, as follows:

"Of the remaining members for which information is available, all but three rely on independent contract growers for the production of at least eighty percent, and usually more, of the broilers they market. One member relies on contract growers for 47.3% of the broilers it markets, and two members raise all of the broilers they market on their own farms. (Table G-1; GX-1)"

At p. 5, numbered paragraph 9, "(M-41)" should be appended to the first quoted excerpt and "(M-39)" should be appended to the second quoted excerpt.

At p. 6, numbered paragraph 10, first line, "contractors" should be "contracts". The sources cited at the end of the paragraph should be "(GX-1; Table G-4)".

At p. 6, numbered paragraph 10, the following sentence should be added: "Many members say that in practice they do not pay growers for birds that die as a result of such causes. (GX-1; Table G-2)."

At p. 6, numbered paragraph 11, subparagraph (b), at the first line of the subparagraph, "48" should be "50".

At p. 6, numbered paragraph 11, subparagraph (c), the references to members' contracts should be "(M-6, 9, 12, 19, 21, 23, 27, 29, 31, 34, 35, 37, 39, 42, 46, 49, 50, 51, 53, 57, 58, 59, 61, 62)" (deleting M-17, 22 and adding M-12, 19, 21).

At p. 7, numbered paragraph 12, line 3, "13" should be "15". The sources cited at the end of the paragraph should be "Barnes ¶30; Table G-3)".

At p. 7, numbered paragraph 13, the second sentence should be as follows: "Of 54 present and former members for which information is available, 36 do not supply or pay for litter, 15 do supply or pay for litter and two members supply litter to one group of growers but do not supply litter to other groups of growers with whom they contract. (Barnes ¶31; Table G-3)"

At p. 8, line 1, "22" should be "21".

At p. 8, numbered paragraph 16, line 3, "chicks" should be "flocks".

At p. 9, numbered paragraph 18, subparagraph (b), line 2, "(M-12)" should be "(M-11)".

At p. 10, numbered paragraph 18, subparagraph (k), line 2, "(M-7, M-14, M-47)" should be "(M-46, M-47)".

Statement of Material Facts Submitted by NBMA as to Which There Is a Genuine Issue to Be Tried

At p. 2, paragraph 1, line 1, "[numeral]" should be "[numeral]" ".

At p. 2, paragraph 2, line 1, "June 6, 1975 Stipulation" should be " "June 6, 1975 Stipulation" ".

At p. 2, paragraph 4, line 1, "[numeral]" should be "[numeral]" ".

At p. 4, numbered paragraph 18, last line, "Objections to Admissibility" should be "*Objections to Admissibility*".

At p. 6, numbered paragraph 22, subparagraph (a), line four, "three" should be "two".

At p. 6, numbered paragraph 22, subparagraph (b), the second sentence should be deleted and the following sentence substituted in its place: "The contract of one member establishes ownership of the feed in the grower."

At p. 7, numbered paragraph 22, subparagraph (e) and (f), last line, "set forth" should be "referred to".

At p. 8, numbered paragraph 23, paragraph two, line four, "a single exception" should be "three exceptions".

At p. 9, numbered paragraph 30, line 2, "the payment" should be "a payment".

At p. 10, numbered paragraph 34, line 5, "members receive" should be "members, receive".

Government's Brief in Support of Its Cross Motion and in Opposition to NBMA's Motion for Partial Summary Judgment

At p. 2, first full paragraph, last line, "(GF-1)" should be "(GF-2)".

At p. 3, line 5, "pro duction" should be "production".

At p. 4, line 6, "(GF-9, 13)" should be "(GF-10, 14)".

At p. 4, first full paragraph, line 14, "(e)" should be "(5)".

At p. 5, second line from the bottom of the page, "Mateial" should be "Material".

At pp. 7 and 14, in the quotations of 7 U.S.C. §291, (a) there should be no space between the eighth and ninth lines of the quotation (p. 7 only); (b) at the beginning of the first proviso, "First:" should be "First."

At p. 25, second full paragraph, line 3, "Broiler Industry" should be "*Broiler Industry*, a trade periodical,".

At p. 26, third line from the bottom of the page, "producer a bailment contract" should be "producer under a bailment contract".

At p. 27, fifth line from the bottom of the page, "pesons" should be "persons".

At p. 37, second line of the footnote, "contractors" should be "contractor's".

At p. 43, third full paragraph, line 9, "Lasbor" should be "Labor".

June 6, 1975 Stipulation

The following corrections and additions to materials placed in the record in accordance with the June 6, 1975 Stipulation are made with the consent of counsel for defendant NBMA.

1. Exhibit GX-1, which is attached to the Stipulation, should be amended as follows:

(a) For Member 26, the entry in the column headed "Percentage of Broilers Raised by Contract Growers" should be "47.3%" rather than "0%", and the entry in the column headed "Live Birds Acquired From Sources Other than Contract Growers" should be "0" rather than "NR".

(b) For Member 28, the entries in each column other than the last (Live Birds Acquired From Sources Other Than Contract Growers) should be "NA" rather than "NR".

2. The "Contracts of NBMA Members," filed pursuant to the Stipulation, should include the following documents, which are submitted herewith to be filed under seal, pursuant to the Court's Protective Order of December 27, 1973:

(a) Contract of Member M-21.

(b) Amendment to contract of Member M-53.

Respectfully submitted this 19th day of June, 1975.

/s/ CHARLES S. STARK
Attorney, Department of Justice
Washington, D. C. 20530

In the United States District Court
For the Northern District of Georgia
Atlanta Division

(Title omitted in printing)

STIPULATION

(Dated April 29, 1975)

The parties hereto acting by and through their attorneys of record hereby stipulate as follows:

The parties hereby waive all objections with respect to authenticity and hearsay to the admission in evidence of the following documents or portions of documents, copies of which are attached hereto, in connection with the Court's consideration of any motion for summary judgment or trial in this action; except that the parties make no stipulation as to the truth, accuracy or relevance of any statement or any statistics contained therein:

(a) Page 3 of *Broiler Marketing Facts, Third Quarter 1975*, United States Department of Agriculture, Agricultural Marketing Service, March, 1975.

(b) Tables appearing on pages 5 and 8 of *The Chicken Broiler Industry: Structure, Practices and Costs*, USDA Economic Research Service, Marketing Research Report No. 930 (1971).

(c) Cost of Living Council Release No. 189, January 4, 1973.

(d) January 24, 1974 letter from George B. Rogers to Mr. Richard Arnold, Office of Economic Policy, Antitrust Division, Department of Justice, with attachments thereto, through the fourth full paragraph on the second page of the letter but not including succeeding paragraphs.

(e) October 21, 1974 letter from Verel W. Benson to Richard Arnold, Office of Economic Policy, Antitrust Division, Department of Justice, with attachment thereto.

(f) Table 2, appearing on p. 28 of *Poultry and Egg Situation*, March 1975, Economic Research Service, United States Department of Agriculture (PES-285).

(g) Table 7.8 appearing in *Egg and Poultry Statistics through 1957*, Statistical Bulletin No. 249, USDA Agricultural Marketing Service (May 1959).

(h) Table 16 appearing in *Egg and Poultry Statistics through 1972*, Statistical Bulletin No. 525, USDA Economic Research Service (February 1974).

(i) Table appearing on p. 10 of *Chickens, Eggs and Broilers: Production, Disposition, Cash Receipts and Gross Income*, 1972-1973 by States, Statistical Reporting Service, USDA Pou 2-3(74), April, 1974.

(j) Table appearing on p. 2, *Poultry Slaughter*, Statistical Reporting Service, USDA Pou 2-1(1-75).

So stipulated, this 29th day of April, 1975.

/s/ CHARLES S. STARK
Attorney, Department of Justice
Attorney for Plaintiff

/s/ FREDERICK H. VON UNWERTH
Attorney for Defendant National
Broiler Marketing Association

(c)

marketing facts

THIRD QUARTER 1975

U S DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
WASHINGTON, D C 20250



Summary

Broiler chick placements for marketing in the first quarter of 1975 were reduced about 8 percent from year-earlier levels because of the poor profit picture. Chick placements and eggs set for marketings in the second quarter of 1975 indicate broiler production will continue below a year ago.

Broilers will face less competition from pork and turkey in the third quarter of 1975 than a year earlier, but more competition from larger supplies of lower grade beef.

Based on historical relationships, broiler production in the third quarter of 1975 at the same per capita level as in 1974 would result in an average price of about 40 cents per pound, approximately 2 cents above 1974. Population is expected to be almost 1 percent above a year earlier.

Feed costs, which account for more than two-thirds of the expense of producing ready-to-cook broilers, may be a little lower in the third quarter of 1975 than the year before based on prospective feed crop plantings and average growing conditions. Corn prices may be about the same as a year earlier, but lower soybean meal prices are expected. Other production, processing, and marketing costs are expected to be higher in the third quarter of 1975.

Current Situation

Broiler production in the first quarter of 1975 may be down about 8 percent from last year's level. Corn prices are running near year-earlier levels, but soybean meal is around $20 per ton lower. Prices paid by farmers for broiler grower feed in mid-January 1975 averaged $176 a ton, $6 above a year ago. The broiler-feed price ratio (pounds of feed equal in value to a pound of liveweight broiler) in January 1975 was 2.8 compared to 2.5 a year earlier. The improvement was the result of the higher value of broilers.

Broiler prices (9-city delivered weighted average) averaged 41.5 cents per pound in January-February 1975, up 1.9 cents from last year. Smaller supplies of pork and turkey are lending strength to broiler prices, but a larger supply of beef and lower real disposable consumer income continue to exert downward pressure.

Broiler production in the fourth quarter of 1974 was down 8 percent from a year earlier. Broiler prices in the fourth quarter of 1974 averaged 40.7 cents per pound, 3.8 cents above a year ago.

Feed costs were higher in the fourth quarter of 1974 than a year earlier. Sharply higher corn prices more than offset the effect of lower soybean meal. Corn prices (No. 2 Yellow, Chicago) averaged $3.56 per bushel, up $1.04 from the year before. Soybean meal (44 percent, Decatur) averaged $139 a ton, down $14 from a year ago. The U.S. average price paid for broiler grower feed in the fourth quarter of 1974 was $183 a ton, $22 above a year earlier.



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Table 1.--Broiler production, live weight, price per pound, value, and civilian per capita consumption, 1934-69[1]

	Production			Average price received by producers per pound	Value of production	Civilian per capita consumption
	Number	Live weight	Pounds produced as percentage of preceding year			
	Millions	Million pounds	Percent	Cents	Million dollars	Pounds
1934	34	97	---	19.3	19	0.5
1935	43	123	126.8	20.0	25	.7
1936	53	152	123.6	20.6	31	.8
1937	68	196	128.9	21.4	42	1.1
1938	82	239	121.9	19.0	46	1.3
1939	106	306	128.0	17.0	52	1.6
1940	143	413	135.0	17.3	72	2.0
1941	192	559	135.4	18.4	103	2.8
1942	228	674	120.6	22.9	155	3.2
1943	285	833	123.6	28.6	238	4.1
1944	274	818	98.2	28.8	235	3.9
1945	366	1,107	135.3	29.5	327	5.0
1946	293	884	79.9	32.7	289	4.1
1947	310	936	105.9	32.3	302	4.3
1948	371	1,127	120.4	36.0	405	5.5
1949	513	1,570	139.3	28.2	443	7.1
1950	631	1,945	123.9	27.4	533	8.7
1951	789	2,415	124.2	28.5	689	10.4
1952	861	2,624	108.7	29.8	754	11.7
1953	947	2,904	110.7	27.1	786	12.3
1954	1,048	3,236	111.4	23.1	747	13.7
1955	1,092	3,350	103.5	25.2	844	13.8
1956	1,344	4,270	127.5	19.6	838	17.3
1957	1,448	4,683	109.7	18.9	886	19.1
1958	1,660	5,431	116.0	18.5	1,002	22.0
1959	1,737	5,763	106.1	16.1	925	22.8
1960	1,795	6,017	104.4	16.9	1,014	23.4
1961	1,991	6,832	113.5	13.9	947	25.9
1962	2,023	6,907	101.1	15.2	1,049	25.6
1963	2,102	7,276	105.3	14.6	1,063	27.0
1964	2,161	7,521	103.4	14.2	1,070	27.5
1965	2,314	8,115	107.9	15.0	1,218	29.4
1966	2,572	8,993	110.8	15.3	1,372	32.2
1967	2,583	9,136	102.1	13.3	1,223	32.7
1968	2,621	9,332	101.6	14.2	1,326	32.8
1969	2,788	10,046	107.7	15.2	1,531	35.3

1/ Includes Alaska and Hawaii beginning in 1961.
2/ Includes consumption in households of producers which is less than 1 percent of total production.

Source: Annual issues of Chicken and Eggs, Production, Disposition, Cash Receipts, and Gross Income, U.S. Dept. Agr., Stat. Rpt. Serv., and Poultry and Egg Situation, Econ. Res. Serv.

Increases in value of production since 1949 have been achieved by substantial increases in pounds produced, since average prices received by producers have trended downward beginning in 1949. From 1948 to 1969, the average price received by producers declined more than 50 percent, while live weight production increased about 890 percent (table 1).

Production Costs

Through the years, production costs probably have paralleled the average equivalent price at the farm level. As shown in table 1, prices declined from 36.0 cents per pound in 1948 to 15.2 cents per pound in 1969. Because production is part of a total firm operation, costs are not known with precision for the past 20 years. However, production costs have probably averaged below prices received by producers.

The greater-than-50-percent reduction in price and cost from 1949 to 1969 was possible because of substantial increases in production efficiency. Primary breeders have improved broiler strains sufficiently to reduce the time needed to produce a 3.5-pound live bird from 12-14 weeks 20 years ago to 8-9 weeks now. Poultry nutritionists have developed improved feed formulations which have helped reduce the amount of feed needed to produce 1 pound of live broiler from 4 pounds in 1940 to 2.2 pounds today. Mortality rates of 10 to 20 percent were common 20 years ago, while a rate of more than 6 percent is considered high today. Man-hours per 1,000 broilers produced declined from 250 in 1940 to 15 in 1969 as a result of increased mechanization, more efficient farm layouts, and larger flock sizes. Recent improvements in modern poultry housing have stressed complete environmental control; that is, control of light, temperature, humidity, and air movement. Although further gains in efficiency are possible, it is difficult to see how they can be of the magnitude of those in the past 20 years.

Production costs in the highly integrated broiler industry include the values of inputs furnished by both the contracting firm and the contract grower. Actual costs per pound of broiler produced vary among flocks and geographic areas, and seasonally. A recent study gave the following typical percentage distribution of production costs (25):

	Percent
Feed	62.4
Chicks	19.2
Grower payment	12.0
Fuel	2.0
Medications	1.6
Vaccination	1.2
Litter	.8
Miscellaneous	.8

EXECUTIVE OFFICE OF THE PRESIDENT

COST OF LIVING COUNCIL

Office of Public Affairs
Room 4013
Washington, D.C. 20507
Phone: 202-254-3240

FOR IMMEDIATE RELEASE
Thursday, January 4, 1973

The Cost of Living Council announced today that it is modifying economic stabilization regulations to include the first sale by producers of broiler chickens and turkeys in the raw agricultural products exemption.

This step is being taken to continue the expansion of poultry production thus better insuring an adequate supply at reasonable prices in the months ahead. Thus poultry producers can plan for expanded production levels with confidence that future production can be marketed in a customary manner.

The first sale of broilers in most instances no longer occurs in live form or at a completely unprocessed stage. Virtually all broilers and many turkeys for slaughter are hatched, grown to slaughter weight, slaughtered, and partially processed before the first sale. The first sale by the poultry producing industry has not been exempt until now. All subsequent sales of dressed poultry products are covered by the applicable Economic Stabilization Program regulations.

The industry is not unlike the fish industry where the killing, scaling, and other processing occurs prior to the first sale. The Council earlier defined "raw seafood" products to include those which have been shelled, shucked, iced, skinned, scaled, eviscerated, or decapitated.

The broiler industry in the post World War II period has been characterized by rapidly expanding production and lower prices. Per capita consumption of all chicken has increased from a level of 27.5 pounds per person in 1957-59 to almost 43 pounds per person in 1972. During this same period prices for broilers have decreased from a level of 31.4 cents per pound to 28 cents per pound. In real terms this decline in price would be even more dramatic. Thus the poultry industry has been a major and growing source of low-cost food for American consumers.

o 0 o

CLC-189

FR 1-3-73 p. 91

United States Department of Agriculture
Economic Research Service
Washington, D.C. 20250

January 24, 1974

Mr. Richard Arnold
Office of Economic Policy
Anti-Trust Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Arnold:

In response to your request, we have refined our method of estimating monthly net returns from producing ready-to-cook whole broilers which we used during the 1973 pre-freeze, price freeze and post-freeze periods. We have extended this analysis back to January 1967. We feel the net returns approach is a far better measure of industry well-being than market prices alone. In "normal" times, there is a well-defined seasonal pattern in broiler demand. But the actual prices which result are influenced by other meat prices and supplies, and occasional exogeneous events. Broiler producers singly or in the aggregate do not always correctly anticipate all these forces in production planning three months earlier. Neither do they correctly anticipate changes in factor costs (such as feed) in advance. If we were to calculate weekly net returns, an even more variable pattern would result, since demand also can shift from week-to-week.

The 9-city weighted average wholesale price is, of course, for ready-to-cook whole birds. Cut-up birds obviously bring more and cost more to produce in total. Over time, the proportion of cut-up birds has trended upward.

The enclosed table presents production and marketing cost estimates for broilers for the January 1967 to September 1973 period. The costs are estimated at the farm and wholesale levels.

The farm level cost is equal to the sum of the estimated feed cost per pound liveweight for broilers and the estimated additional production costs such as chick cost, medication cost, grower payment, and fuel and litter costs. The feed costs are based on a constant feed ration of 29.14 percent soybean meal and 70.86 percent corn. Actual feed rations are much more complex containing many ingredients; however, these two ingredients generally make up a large portion of the ration and can be used to approximate the cost of protein and carbohydrate feed ingredients, respectively. The cost of the ration is then increased by 5 percent to account for small quantities of more expensive ingredients such as minerals and vitamins. The corn and soybean meal costs are based on monthly average prices for number 2 corn in Chicago plus 10 cents per bushel shipping cost and on 49 percent soybean meal in Decatur plus $12.00 per ton shipping cost. Milling and distribution costs are also added to the feed cost.

The estimated additional production costs are equal to the sum of the estimated chick cost, medication cost, fuel and litter costs and the contract grower payment. The additional production costs may be overstated in some cases since broiler contracts differ as to whether the contract grower or the integrator provides all or some portion of the fuel and litter, thus, some double counting should increase the cost by less than one-half cent per pound in cases where the grower is providing all fuel and litter. It should also be noted that broiler grower contracts and feed ingredient costs vary by region of the country, thus, the production costs may be overstated for one region and understated for another.

The marketing costs related to collecting the broilers, transporting them to the processing plant, processing the broilers, and delivering the broilers to the retailers were estimated for 1972 using estimates provided by USDA extension personnel and by processors. Again costs vary regionally due to differences in labor costs, taxes and shipping cost. The 1972 data was adjusted by labor cost and materials cost indicies to estimate the 1967 to 1971 processing costs.

A preliminary analysis of the net returns data in Column 8 of Table 1 indicates that 1968 and 1969 are the only years in which the broiler industry maintained a positive net return for virtually every month. Broiler prices began to fall in mid-1970 creating losses as high as 4.57 cents per pound in December 1970. Price remained low in early 1971 resulting in further losses. The depletion of cash assets during this period should have and did lead to a cutback in broiler production. A study by Gerald O'Mara at North Carolina State University indicates that there is a high positive correlation between the number of broiler chicks placed per month and the accumulative cash assets for the previous five months.

The production costs and wholesale prices of broilers were relatively stable for most of 1972 with very little gain or loss in net returns. However, late in 1972 the increasing feed grain price increased the cost of broiler production resulting in a considerable loss. Finally, the instability of feed grain and meat prices as well as the price freeze led to large fluctuations in net returns for 1973.

Sincerely,

/s/ GEORGE B. ROGERS
Program Leader, Poultry Area
Commodity Economics Division

Enclosures

UNITED STATES DEPARTMENT OF AGRICULTURE
ECONOMIC RESEARCH SERVICE
WASHINGTON, D.C. 20250
Commodity Economics Division

October 21, 1974

OCT 23 10 01 74

Richard Arnold
Economic Policy Office
Anti-Trust Division
Department of Justic

Dear Mr. Arnold:

Enclosed is a revised set of cost and net return estimates on broilers. These are still preliminary estimates which will be subject to additional revision as more data becomes available. They are still only good indicators of direction and level and should not be construed to be official USDA estimates. We will continue to supply you with revised estimates as they become available.

Sincerely,

Verel W Benson

VEREL W. BENSON
Agricultural Economist

Enclosure

Per capita consumption of broilers by months, 1967-73

Year	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Annual
1967	2.652	2.255	2.652	2.522	3.103	3.071	2.725	3.182	2.808	2.914	2.474	2.374	32.8
1968	2.725	2.412	2.525	2.693	2.990	2.761	3.079	3.0[illegible]	2.768	3.192	2.323	2.548	33.1
1969	2.954	2.436	2.615	2.887	3.062	3.122	3.077	3.085	3.125	3.321	2.475	2.984	35.2
1970	3.057	2.742	3.021	3.315	3.141	3.483	3.443	3.212	3.181	3.305	2.635	2.935	37.4
1971	2.904	2.732	3.156	3.077	3.021	3.315	3.167	3.405	3.196	3.208	2.923	3.015	37.1
1972	3.065	2.984	3.244	3.113	3.575	3.552	3.162	3.672	3.149	3.428	3.047	2.854	38.8
1973	3.270	2.803	3.079	2.936	3.523	3.341	3.331	3.441					

DATE											NET RETURNS	PRICE AS A PERCENT OF COST
			(PER TON)	(PER/CWT)								
JAN	1967	...										
FEB	1967	...										
MAR	1967	...										
APR	1967	...										
MAY	1967	...										
JUN	1967	...										
JUL	1967	...										
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DATE											
			(PER TON)	(PER/CWT)							
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- PES 285 MARCH 1975

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POULTRY AND EGG Situation



ECONOMIC RESEARCH SERVICE

U.S. DEPARTMENT OF AGRICULTURE

Table 2—Estimated production costs, total costs, and net returns for Broilers, 1972-74[1]

Period	Production costs		Total wholesale ready-to-cook costs[2 3]	9-city weighted average broiler price[3]	Net returns[3 5 6]
	Feed[3]	Total[3]			
	Cents per pound live weight		*Cents per pound live weight*		
1972					
1st quarter	8.3	13.6	27.2	27.8	0.6
2nd quarter	8.8	14.2	28.0	27.2	-0.7
3rd quarter	9.2	14.6	28.5	29.6	1.1
4th quarter	9.7	15.0	29.2	28.0	-1.2
Annual average	9.0	14.3	28.2	28.2	-0.1
1973					
1st quarter	13.2	18.0	34.0	37.0	3.0
2nd quarter	14.2	20.1	36.9	42.2	5.4
3rd quarter	21.2	27.0	46.5	52.8	6.3
4th quarter	17.6	23.4	41.5	37.2	-4.3
Annual average	16.4	22.2	39.8	42.4	2.6
1974[4]					
1st quarter	16.1	22.3	40.5	39.3	-1.2
2nd quarter	15.2	21.3	39.2	35.3	-3.9
3rd quarter	14.5	20.7	38.3	37.6	-0.7
4th quarter	17.7	23.8	42.6	40.4	-2.3
Annual average	15.8	22.0	40.1	38.0	-2.0

[1] Based on secondary data and incomplete data from survey. Estimated by computerized formula. [2] Weighted by monthly broiler slaughter. [3] Based on farm cost converted to wholesale market values for ready-to-cook broilers. [4] Preliminary. [5] May not add across due to rounding.

Table 3—Estimated production costs, total costs, and net returns for Turkeys, 1972-74[1]

Period	Production costs		Total wholesale ready-to-cook costs[2 3]	New York heavy young hen turkey price[3]	Net returns[3 5 6]
	Feed[3]	Total[3]			
	Cents per pound liveweight		*Cents per pound ready-to-cook*		
1972					
1st quarter	11.9	18.9	32.2	36.9	4.7
2nd quarter	12.9	19.9	33.3	34.8	1.4
3rd quarter	13.5	20.5	34.1	35.3	1.2
4th quarter	14.1	21.1	34.9	38.5	3.7
Annual average	13.5	20.5	34.1	36.6	2.8
1973					
1st quarter	15.4	22.9	37.8	45.1	7.3
2nd quarter	19.8	27.3	43.3	55.9	12.6
3rd quarter	27.0	34.5	52.3	69.2	16.9
4th quarter	28.2	35.7	53.8	67.2	13.4
Annual average	25.6	33.1	50.6	64.5	13.9
1974[4]					
1st quarter	22.1	30.3	48.4	49.9	1.6
2nd quarter	23.6	31.8	50.2	39.2	-11.0
3rd quarter	19.9	28.1	45.6	45.6	-0.1
4th quarter	24.8	33.0	51.7	52.1	0.4
Annual average	22.5	30.7	48.8	47.0	-1.8

[1] Based on secondary data and incomplete data from survey. Estimated by computerized formula. [2] Weighted by monthly turkey slaughter. [3] Based on farm cost converted to wholesale market values for heavy young turkey hens. [4] Preliminary. [5] May not add across due to rounding.

(9)

Egg and Poultry STATISTICS Through 1957



STATISTICAL BULLETIN NO. 249
MAY 1959

AGRICULTURAL MARKETING SERVICE
U. S. DEPARTMENT OF AGRICULTURE

Table 7.8 --Commercial broilers: Production and value, 1934-57

Year	Production		Price per pound	Gross income 1/
	Number	Liveweight		
	Thousands	1,000 pounds	Cents	1,000 dollars
1934	34,030	96,594	19.3	18,661
1935	42,890	122,637	20.0	24,551
1936	53,155	152,217	20.6	31,357
1937	67,915	195,633	21.4	41,809
1938	82,420	239,126	19.0	45,509
1939	105,630	306,132	17.0	52,037
1940	142,762	413,474	17.3	71,621
1941	191,502	558,905	18.4	102,975
1942	228,187	674,087	22.9	154,650
1943	285,293	832,837	28.6	238,262
1944	274,149	817,605	28.8	235,282
1945	365,572	1,107,174	29.5	327,059
1946	292,527	883,855	32.7	288,603
1947	310,168	936,442	32.3	302,170
1948	370,515	1,126,643	36.0	405,171
1949	513,296	1,570,197	28.2	442,530
1950	631,458	1,944,524	27.4	532,652
1951	786,601	2,414,767	28.5	689,317
1952	860,831	2,623,934	28.8	756,182
1953	946,533	2,904,174	27.1	786,324
1954	1,047,798	3,236,248	23.1	746,891
1955	1,078,264	3,309,295	25.2	834,210
1956	1,343,660	4,269,502	19.6	838,450
1957	1,451,661	4,692,603	18.9	887,303

1/ Includes consumption in households of producers which is less than 1 percent of total production.

Data published currently by the Crop Reporting Board.

Statistical Bulletin No. 525

(h)



POULTRY AND EGG STATISTICS THROUGH 1972

ECONOMIC RESEARCH SERVICE / UNITED STATES DEPARTMENT OF AGRICULTURE

Table 15.--Eggs: Production, disposition and value, 1960-72 1/

Year	Average number of layers on hand during the year	Eggs: Produced: Per layer on hand during the year 2/	Eggs: Produced: Total	Eggs: Consumed on farms where produced	Eggs: Sold	Eggs: Price per dozen	Value of: Sales	Value of: Sales and consumption 3/
	Millions	Number	Millions	Millions	Millions	Cents	Mil./dol.	Mil./dol.
1960	295	209	61,462	3,782	57,680	36.0	1,731	1,841
1961	297	210	62,423	3,364	59,509	35.6	1,750	1,848
1962	300	212	63,569	3,026	60,543	33.8	1,703	1,787
1963	298	213	63,500	2,729	60,770	34.5	1,747	1,824
1964	301	217	65,215	2,439	62,776	33.8	1,770	1,836
1965	301	218	65,560	2,056	63,504	33.7	1,785	1,841
1966	304	218	66,205	1,612	64,593	39.1	2,106	2,157
1967	314	221	69,327	1,558	67,769	31.3	1,765	1,804
1968	309	221	68,156	1,393	66,763	34.0	1,893	1,931
1969	307	220	67,546	1,172	66,374	40.0	2,212	2,250
1970	313	218	68,282	1,004	67,277	39.1	2,192	2,224
1971	315	223	70,082	805	69,276	31.4	1,813	1,833
1972 4/	307	227	69,804	682	69,122	30.9	1,781	1,798

1/ Data include Alaska and Hawaii beginning in 1961. Since 1969, data cover the period December 1 previous year through November 30. 2/ Number of eggs produced during the year divided by the average number of layers on hand during the year. 3/ Eggs consumed are valued at same price per dozen as eggs sold. 4/ Preliminary.

Table 16.--Commerical broiler production, average liveweight, price per pound and value, 1960-72 1/

Year	Production: Number	Production: Liveweight	Average liveweight per bird	Average price received by producers per pound	Value of production 2/
	Millions	Million pounds	Pound	Cents	Million dollars
1960	1,795	6,017	3.35	16.9	1,014
1961	1,991	6,832	3.43	13.9	947
1962	2,023	6,907	3.41	15.2	1,049
1963	2,102	7,276	3.46	14.6	1,063
1964	2,161	7,521	3.48	14.2	1,070
1965	2,334	8,111	3.48	15.0	1,217
1966	2,571	8,989	3.50	15.3	1,371
1967	2,592	9,183	3.54	13.3	1,223
1968	2,620	9,326	3.56	14.2	1,326
1969	2,789	10,048	3.60	15.2	1,531
1970	2,987	10,819	3.62	13.6	1,475
1971	2,945	10,818	3.67	13.7	1,487
1972 3/	3,075	11,478	3.73	14.1	1,622

1/ Includes Alaska and Hawaii beginning in 1961. Since 1969, data cover the period December 1 previous year through November 30. 2/ Includes consumption in households of producers which is less than 1 percent of total production. 3/ Preliminary

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chickens, eggs & broilers

PRODUCTION, DISPOSITION, CASH RECEIPTS AND GROSS INCOME, 1972 – 1973 BY STATES

Pou 2-3 (74) April 1974 CROP REPORTING BOARD
STATISTICAL REPORTING SERVICE • U.S. DEPARTMENT OF AGRICULTURE • WASHINGTON, D.C.

BROILERS PRODUCTION AND GROSS INCOME 1972 – 1973 1/

STATE	1972 NUMBER PRODUCED	1972 POUNDS PRODUCED	1972 PRICE POUND	1972 GROSS INCOME 2/	1973 NUMBER PRODUCED	1973 POUNDS PRODUCED	1973 PRICE POUND	1973 GROSS INCOME 2/
	THOUSANDS		CENTS	1000 DOLLARS	THOUSANDS		CENTS	1000 DOLLARS
ALA.	399274	1437386	13.1	188298	399324	1497568	23.4	336390
ARK.	532135	1862473	13.7	254159	501445	1758458	23.7	416281
CALIF.	88022	361292	17.5	63228	83193	341091	24.7	84249
CONN.	3329	13849	16.2	2211	2736	11486	25.5	2924
DEL.	131473	514305	15.7	80748	140967	583868	23.8	136201
FLA.	54855	209824	13.3	27882	56833	215965	23.1	49888
GA.	442937	1638967	13.1	214692	412988	1528068	23.9	365203
HAWAII	2846	7181	33.5	2399	1915	6783	39.5	2668
IND.	13201	58144	14.4	7994	13583	50257	22.9	11509
IOWA	2992	23938	28.0	6702	3888	29168	40.0	11667
KANS.	613	2146	15.6	335	703	2601	23.4	609
KY.	7257	27577	13.5	3723	7238	27508	24.9	6852
LA.	55769	208345	13.9	28882	55508	188731	24.1	45484
MAINE	71344	308779	14.2	43898	75642	317696	25.5	81012
MD.	177247	691263	15.7	108528	190673	743625	23.8	176983
MICH.	566	2943	18.5	544	D	D	0.0	0
MINN.	11039	47468	16.1	7642	11140	49056	28.2	13834
MISS.	256264	948177	13.2	125158	239138	886781	23.5	207924
MO.	23354	88745	13.5	11981	21533	81825	23.6	19311
NEBR.	1733	6412	17.5	1122	2267	9068	28.2	2557
N. J.	650	3575	30.0	1073	625	3500	39.0	1365
N. Y.	1730	6920	23.0	1592	1858	6270	31.0	1944
N. C.	381772	1174911	13.9	163591	790448	1132767	24.5	277523
OHIO	12700	50800	13.3	6756	14000	54600	23.5	12831
OKLA.	21500	77400	13.8	10681	23650	85140	24.9	20436
PA.	59368	243409	16.4	39919	61263	251178	27.5	69074
S. C.	29263	98921	13.2	13058	28853	100986	23.6	23833
TENN.	54967	197863	13.1	25920	52342	177729	22.7	39209
TEXAS	178511	686491	14.2	93790	173330	641321	22.8	146721
VA.	77238	279857	15.1	41987	77168	285522	23.7	67669
WASH.	16394	63944	18.4	11764	17575	68563	26.6	18232
W. VA.	15951	58829	12.5	6979	17301	53633	23.3	12496
WISC.	13136	58459	15.1	8525	14795	62139	26.0	16156
OTHER STATES 3/	17100	62810	17.6	11054	14000	53200	25.0	13300
U. S.	3074921	11498101	14.1	1622638	3008110	11716989	24.0	2808563

1/ COMMERCIAL BROILER PRODUCTION INCLUDING PRODUCTION OF OTHER MEAT-TYPE BREEDS-EXCLUDES STATES PRODUCING LESS THAN 500,000. 2/ INCLUDES HOME CONSUMPTION WHICH IS LESS THAN 1 PERCENT OF TOTAL PRODUCTION. 3/ INCLUDES IDAHO AND OREGON.

75.4% Federally Inspected 96.3%

poultry slaughter

(JL)

December 1974

Release:
January 30, 1975
3:00 P.M. ET

In this Issue:
Slaughter Under Federal Inspection
Poultry Used in Further Processing
Total Poultry Slaughtered

Inspected Poultry - There were 1,036 million pounds live weight of poultry inspected for slaughter during December 1974 by the United States Department of Agriculture. This is 3 percent below the previous month and 6 percent less than December 1973.

Young chickens inspected totaled 819 million pounds, 13 percent more than the previous month, but slightly below December 1973. Mature chickens inspected totaled 60 million pounds, 2 percent less than last year and down 5 percent from last month. Total turkeys inspected at 152 million pounds were down 31 percent from a year ago and 44 percent from November 1974. Duck inspections at 4.5 million pounds were 8 percent below the previous month but about the same as December 1973.

Poultry Certified Wholesome in December totaled 731 million pounds ready-to-cook weight -- down 4 percent from the previous month and 7 percent from December 1973. Of the December 1974 total, 81 percent was chilled and 19 percent was frozen.

Further Processed poultry totaled 135 million pounds ready-to-cook weight -- down 8 percent from December 1973 and 21 percent from November 1974.

Poultry Cut-up and Packaged totaled 219 million pounds ready-to-cook weight -- up 9 percent from December 1973 and 4 percent above last month.

Ante-Mortem Condemnations during December were 3.7 million pounds liveweight. This was 0.35 percent of total quantities inspected, compared with 0.45 percent a year ago. Post-Mortem Condemnations were 20.9 million pounds (NYD weight). This was 2.25 percent of total quantities inspected, compared with 2.76 percent in December 1973.

Total Poultry Slaughtered (including that slaughtered in non-federally inspected plants) during December 1974 was 768 million pounds ready-to-cook weight, down 9 percent from December 1973 and 4 percent from last month.

UNITED STATES DEPARTMENT OF AGRICULTURE
STATISTICAL REPORTING SERVICE CROP REPORTING BOARD
Pou 2-1 (1-75) WASHINGTON, D.C. 20250

POULTRY SLAUGHTERED UNDER FEDERAL INSPECTION, DECEMBER 1974 WITH COMPARISONS

	Young chickens	Mature chickens	Other poultry	Total poultry
Number inspected 3/				
November 1974	191,508	14,492	788	206,788
December 1973	214,700	15,742	730	231,172
December 1974	212,245	14,049	732	227,026
Jan.-Dec. 1973	2,007,557	149,476	10,000	2,167,033
Jan.-Dec. 1974	2,000,628	143,326	11,523	2,155,477
Pounds inspected 4/				
November 1974	726,669	63,791	4,948	795,408
December 1973	819,474	61,527	2,516	883,517
December 1974	818,736	60,215	381	879,332
Jan.-Dec. 1973	10,000,884	933,667	7,218	10,941,769
Jan.-Dec. 1974	10,000,838	951,074	8,018	10,959,930
Average liveweights 5/				
November 1974	3.80	4.39	6.28	3.84
December 1973	3.82	3.44	6.21	3.82
December 1974	3.86	4.30	6.21	3.86
Jan.-Dec. 1973	3.73	4.19	6.39	3.78
Jan.-Dec. 1974	3.78	4.46	6.27	3.83

1/ Of the mature chickens inspected, the number reported in thousands as heavy fowl (broiler breeding stock) was:
November 1974, 2,141 December 1973, 2,441 and December 1974, 2,128.
2/ Of the young turkeys inspected, the number reported in thousands as young hens (roasters) was:
November 1974, 191 December 1973, 561 and December 1974, 28.
3/ Thousands 4/ 1,000 pounds 5/ Pounds

POULTRY: POUNDS CERTIFIED (READY-TO-COOK WEIGHT) 1/

	Young chickens	Mature chickens	Total chickens	Turkeys	Ducks	Other poultry	Total poultry
November 1974							
Chilled	478,345	36,087	514,432	329	75	75	514,911
Frozen	65,198	5,643	70,841	3,175	1,633	1,633	75,649
Total	543,533	40,670	584,601	3,504	1,708	1,708	590,560
December 1973							
Chilled	536,066	31,878	567,944	274	30	30	568,248
Frozen	63,210	6,745	69,955	2,931	204	204	72,290
Total	599,276	38,623	637,899	3,205	234	234	641,338
December 1974							
Chilled	568,782	31,963	600,745	263	8	8	608,916
Frozen	68,869	6,168	75,037	2,953	341	341	78,331
Total	637,651	38,131	675,782	3,141	349	349	687,247
January-December 1973							
Chilled	6,119,554	429,129	7,548,683	1,841	675	675	7,551,199
Frozen	1,446,542	92,361	1,538,903	47,360	3,913	3,913	7,290,176
Total	7,736,096	521,490	8,387,586	49,196	4,588	4,588	8,441,375
January-December 1974							
Chilled	6,536,328	336,328	7,736,656	1,719	266	266	8,121,690
Frozen	1,614,559	100,638	1,715,196	60,613	4,827	4,827	7,222,636
Total	8,150,887	536,967	8,451,852	51,332	5,027	5,027	16,343,884

1/ 1,000 pounds

In the United States District Court
For the Northern District of Georgia
Atlanta Division

(Title omitted in printing)

STIPULATION

(Dated June 6, 1975)

The parties hereto, acting by and through their attorneys of record, hereby stipulate as follows:

1. The parties hereby waive all objections with respect to authenticity and hearsay to the admission of the following documents, copies of which are attached hereto, in connection with the Court's consideration of any motion for summary judgment or trial in this action; except that the parties make no stipulation as to the truth, accuracy or relevance of any statement or any statistical data contained therein:

(a) Letter of May 9, 1975, from George B. Rogers to Charles S. Stark, with attachments thereto; and

(b) Letter of May 23, 1975 from George B. Rogers to Charles S. Stark.

2. The parties hereby stipulate that the contracts of present and former members of NBMA, which have been designated confidential pursuant to the Court's Protective Order of December 27, 1973 and copies of which have been filed herewith under seal, are the written contracts in effect between the members and contract broiler growers as of June, 1974, or as of such other date as may be specified on the face of the contract; and the parties waive all objections with respect to authenticity and hearsay to the admission of these contracts in connection with

the Court's consideration of any motion for summary judgment or trial in this action.

3. The parties hereby stipulate as follows with respect to the use in connection with this action of the affidavit of Dr. Irston Barnes and the statistical tables attached thereto, submitted by NBMA in support of its motion for partial summary judgment:

(a) Plaintiff does not contest the accuracy of tables G-4, G-5, G-6 and G-8, and waives any objections on grounds of hearsay to the admission of those tables; except that plaintiff does not concede that the growers for whom data is compiled in Table G-5 are "representative" growers.

(b) Plaintiff does not contest the accuracy of table G-1 and waives any objections on grounds of hearsay to the admission of that table, subject to the following clarification to which the parties agree: that each entry showing that a member has a contractual relationship ("C") with respect to breeder flocks and hatcheries indicates that the member purchases day-old chicks from a separately-owned source; that each "C" entry with respect to feed mills indicates that the member purchases feed from a separately-owned source; and that each "C" entry with respect to processing indicates that the member sells live birds to a separately-owned processing plant on a cash basis.

(c) Plaintiff does not contest the accuracy of the portion of table G-2 that sets forth the number of growers under contract to NBMA members in 1973, and waives any objections on grounds of hearsay to the admission of that portion of the table.

(d) Plaintiff does not contest the accuracy of that portion of table G-2 that specifies whether, with respect to each member, the member or the grower has title to the birds during the grow out period, and waives any objections on grounds of hearsay to the admission of that portion of the table for purposes of establishing the identity of the party having title to the birds. Plaintiff does not, however, concede the accuracy of that portion of the

table insofar as it purports to identify the party having the "risk of loss" during the grow out period, and does not waive any objections with respect thereto.

(e) Plaintiff does not contest that the portion of table G-2 that purports to state whether NBMA members make payments to growers in the event a flock is lost due to disease, whether, with no neglect or in transport, accurately compiles the members' responses to NBMA's survey questionnaire. Plaintiff does not concede, however, that each member's response accurately reflects the member's practice.

(f) Plaintiff does not contest the accuracy of table G-3 and waives any objections on the grounds of hearsay of the admission of that table, with the qualification that plaintiff contests any inference that may be drawn from the table that all NBMA members supply all of the inputs specified without cost to the grower.

(g) Plaintiff does not contest the accuracy of Table G-7, and waives any objection on grounds of hearsay to the admission of that table, with the following qualification and clarification:

(i) Plaintiff does not contest that the table accurately reports NBMA members' representations as to "informal assurances" to growers of further contracts, but does not concede that growers in fact have any contractual or practical guaranty of a continuing contractual relationship.

(ii) The parties agree to the clarification that the data in the last column of the table, setting forth the number of growers lost by each member since 1970 refers only to growers lost to competitors and does not purport to include all growers terminated during the period, either at their own or at the member's initiative.

4. Defendant does not contest the accuracy of plaintiff's Exhibit GX-1, a copy of which is attached hereto, and waives any

objections on grounds of hearsay to the admissibility of the Exhibit in connection with the Court's consideration of any motion for summary judgment or trial in this action.

So stipulated, this 6th day of June, 1975.

/s/ CHARLES S. STARK
Attorney, Department of Justice
Attorney for Plaintiff

/s/ MICHAEL A. DOYLE
Attorney for Defendant
National Broiler Marketing
Association

ROGERS MAY 9, 1975 LETTER

UNITED STATES DEPARTMENT OF AGRICULTURE
ECONOMIC RESEARCH SERVICE
WASHINGTON, D.C. 20250

Commodity Economics Division

May 9, 1975

Mr. Charles S. Stark
Anti-Trust Division
United States Department of Justice
Washington, D.C. 20530

Dear Mr. Stark:

Enclosed is a summary table prepared from a preliminary analysis of our survey data on broiler production costs. Some of our people made a special effort to complete this summary within the time period involved. We do feel these costs are reasonably accurate and complete.

Direct comparison of the individual costs in broiler production in the two regions is difficult. Survey data did not cover the same proportions of flocks in each quarter of the total time period. Moreover, the nature of contract terms and the kinds and proportions of inputs furnished by contract growers and contractors vary within and between regions. Since these costs cover an extended time period, they are not representative of costs at present or in many past months. Costs of producing broilers in any area will vary from month-to-month, depending on feed ingredient prices, seasonality of fuel requirements for brooding, changes in measures of performance, and changes in factor prices.

Because of the time differences in the two area surveys, the table should not be used to conclude that Northeastern costs are necessarily lower than in the South. There is also wide variation between flocks in both regions. However, grower payments in broiler production do tend to average higher in the Northeast than in the South. This is a function of the extent of competition for growers versus other economic alternatives in various areas, distances producing areas are from major markets (shipping costs), and some price premiums obtained for Northeastern broilers over Southern birds due to differences in packs and types of outlets serviced.

The question about the relative shares of grower and contractor costs which are fixed or variable is not a simple one to answer, particularly from the standpoint of the contractor. First, the records which were obtained did not separate contractor costs into fixed and variable components and there is thus no such identification in the cost table. There would be, of course, fixed costs incurred by contractors in operating feed mills and hatcheries as part of an integrated organization. There are, in addition, some small fixed costs

FOIA 115-47
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included in other line items under contractor costs. Although not a fixed cost in a strict accounting sense, one could also argue that most production contracts specify a minimum rate of payment to contract growers which is a "fixed" amount.

Most of the cost of feed is represented by ingredients and most of the chick cost by hatching eggs. These are variable. Other variable costs in mills and hatcheries cover labor, energy, supplies, etc., but these are not large in relation to feed ingredients or hatching eggs. Some older studies suggested that about 35 percent of milling costs (not including ingredient cost) were fixed, and that around 18 percent of chick costs (including eggs) were fixed. But embodied fixed costs in a ton of feed (including ingredient cost) would be small, perhaps in the 3-5 percent range. All of the preceding proportions would vary as feed ingredient and hatching egg prices change up and down.

On the basis of the data in the table, grower fixed costs of just under one cent per pound would represent 60-70 percent of grower costs and 35-45 percent of grower payment (which includes return to operator labor and management). Estimates we made using data from the table and fixed cost percentages from older studies suggest contractor fixed costs (in an integrated organization) would be over one cent per pound, and over 5 percent of total contractor costs. If a minimum grower payment were added to the preceding fixed costs, the resulting figure of over three cents per pound would range from 14 to well over 15 percent of total contractor costs. Even with somewhat different figures, it seems apparent that grower fixed costs constitute a substantially higher <u>percentage</u> of total grower costs than contractor fixed costs do of total contractor costs. On the other hand, the <u>absolute</u> amount of fixed costs incurred by contractors exceeds grower fixed costs.

We are also enclosing revised sets of numbers from our program for estimating monthly U.S. broiler costs and returns. These are on two different bases, as discussed below. But the revised figures do not essentially change earlier general conclusions.

The enclosed tables of monthly quarterly and annual estimated costs and returns for broilers were revised April 22, 1975. The first set of tables is based on current monthly feed costs, i.e., monthly average corn and soybean meal prices are paired with wholesale broiler prices for the same month as in previous monthly estimates furnished to you.

The second set of estimates is based on corn and soybean meal prices which were paired with wholesale broiler prices two months in the future, as published in the November 1974 and March 1975 issues of the Poultry and Egg Situation. The data published in the Poultry and Egg Situation is presented only in quarterly and annual form. These estimates will be revised to reflect quarterly marketing cost changes as this information becomes available.

3.

The costs are estimated at the farm and wholesale levels. The farm level cost is the sum of the estimated feed cost per pound liveweight and the estimated additional production costs such as chicks, medication, fuel and litter, labor and overhead. A fixed annual marketing margin is added to the production cost per pound for ready-to-cook broilers to arrive at a wholesale delivered cost. The farm to wholesale marketing margin is the sum of the estimated processing, shipping, and handling costs from the farm to the wholesale level. Production costs other than feed cost vary annually. These costs may overstate the costs for periods of peak seasonal production, however, they may also understate costs for low seasonal production levels. However, sufficient data are not presently available to estimate these cost differences more accurately.

Feed cost per ton is estimated as a function of the price of corn and soybean meal. Specified percentages of corn and soybean meal make up the ration. The monthly average Chicago corn and Decatur soybean meal prices were increased by a shipping cost differential and used as estimates of ingredient costs. In addition, ration costs were increased by 5 percent to account for the small quantities of more expensive ingredients which were added to balance the ration. Milling and distributing costs were also added to all rations.

The tables present the weighted average quarterly and annual cost, price, and net return estimates. The monthly estimates for broilers were weighted by federally inspected slaughter to obtain weighted quarterly and annual averages. The feed cost per pound liveweight is presented separately since it shows the direct effect of feed ingredient costs on the cost of production.

Please note that these data are revised and updated from previous tables sent to you.

We have also sent a copy of this letter to Mr. Michael A. Doyle, attorney for NBMA, in fulfillment of his parallel request for our data.

Sincerely,

George B Rogers

GEORGE B. ROGERS
Program Leader,
Poultry

Broiler Production Costs and Efficiency, Southern and Northeastern Regions, 1972-74 1/

Item	South 2/	Northeast 3/
Sample characteristics		
Farms (no.)	108	118
Flocks sold (no.)	415	592
Broilers sold (1,000)	11,111	25,201
Aver. live wt. (lbs/bird)	3.77	3.96
Mortality (percent)	3.26	4.72
Feed conversion (lbs. feed per lb. broiler)	2.17	2.14
Costs	Average (cents per pound, salable live wt.)	Average (cents per pound, salable live wt.)
Grower:		
Fuel	0.14	0.09 6/
Electricity	0.07	0.10
Litter	0.10	0.03
Hired labor	0.15	0.19 7/
Miscellaneous	0.19 4/	0.02 8/
Total variable	0.65	0.43
Depreciation	0.43	0.42
Interest	0.32	0.21
Insurance	0.08	0.08
Repairs, maintenance	0.11	0.15
Taxes	0.05	0.10 9/
Total fixed	0.99	0.96
Total grower:	1.64	1.39
Contractor:		
Feed	16.65	16.25
Chicks	2.80	2.77
Grower payment	2.30	2.63
Medication, vaccination	0.24	0.34 10/
Fuel	0.14	0.32
Litter	0.02	0.10
Other	0.32 5/	0.11 11/
Total contractor	22.47	22.52

1/ Data collected in the South by Georgia Agr. Exp. Sta., in Northeast by Pennsylvania Agr. Exp. Sta. under cooperative agreements with Econ. Res. Serv., U. S. Dept. of Agr.

2/ Includes Alabama, Georgia, North Carolina, Arkansas, Texas, Mississippi.

3/ Includes Pennsylvania, Maine, Delaware, Maryland, Virginia.

4/ Includes waste disposal, water, dues and other costs.

5/ Includes administration, field supervision, insurance, and miscellaneous. Not all cost items included.

6/ Includes manure and other waste disposal and fuel for heat. See also 7/.

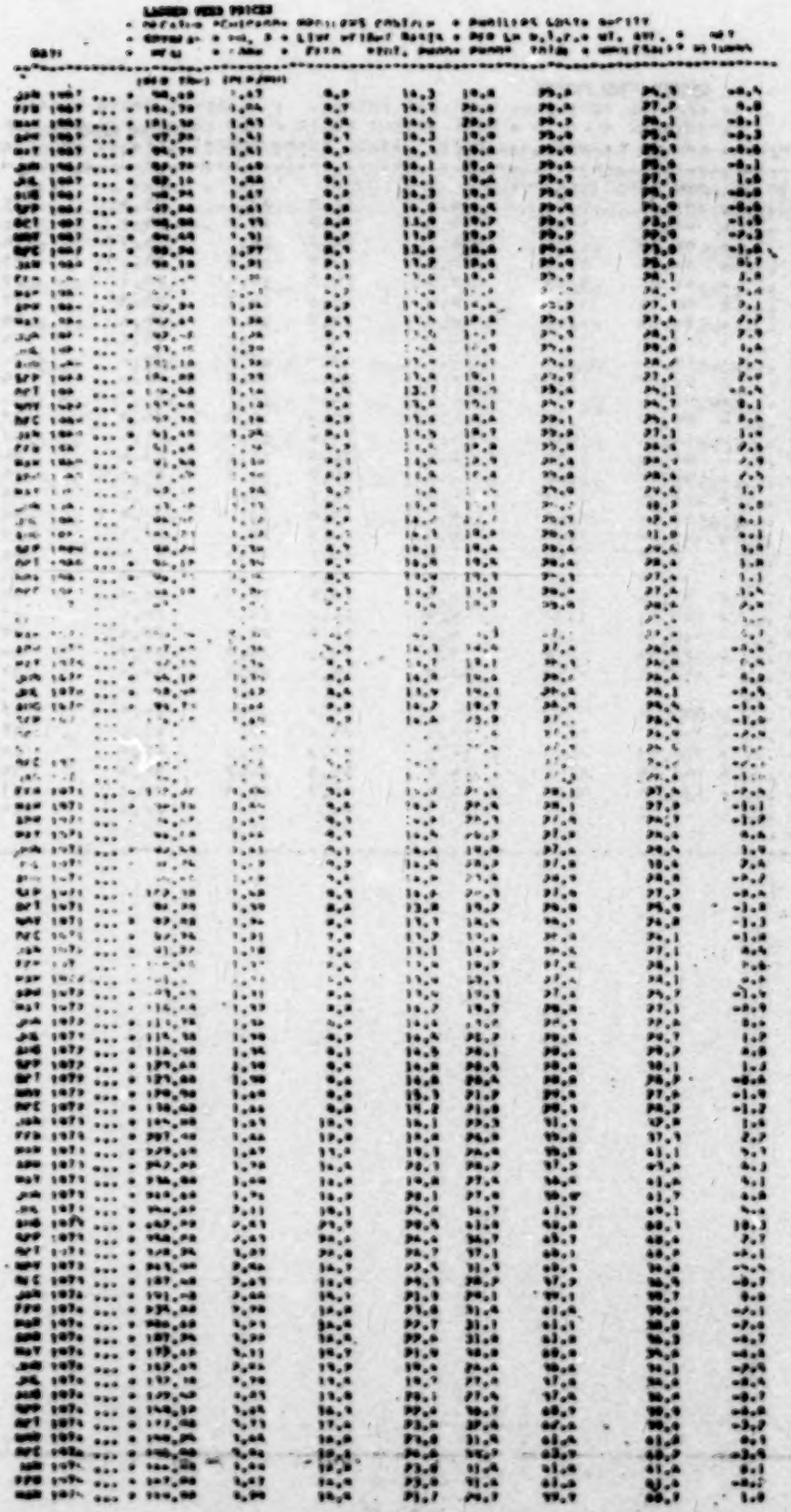
7/ Adjusted for payment in kind frequently associated with manure disposal.

8/ Includes sanitation, dues, and other miscellaneous costs.

9/ Includes rent.

10/ Includes services for sexing, debeaking.

11/ Includes sanitation, electricity, dues and other miscellaneous costs. May not completely include some small items.



DATE	LAGGED FEED PRICES: SOYBEAN MEAL (PER TON)	CORN (PER/BU)	BROILERS COST/LB LIVE WEIGHT BASIS: FEED	START. PROG.	GROW PROG.	BROILERS COSTS PER LB R.T.F.: TOTAL	QUANTITY WT. AVE. WHOLESALE	ESTIMATED NET RETURNS
1967 ...	97.18	1.68	8.1	14.1	18.7	25.9	25.9	-0.9
1968 ...	96.98	1.94	8.4	13.5	18.8	25.4	27.2	1.8
1969 ...	96.11	1.99	8.5	13.8	18.9	26.9	29.9	3.0
1970 ...	98.87	1.62	8.8	14.2	18.7	26.8	26.4	-0.5
1971 ...	94.11	1.68	8.8	14.3	18.8	27.8	27.5	-0.3
1972 ...	113.48	1.98	8.8	14.3	18.8	28.3	28.2	-0.1
1973 ...	273.81	3.11	18.4	22.2	30.8	54.8	42.4	7.6
1974 ...	171.81	3.13	15.8	22.8	30.1	48.1	38.8	-2.8

DATE	• SOYBEAN MEAL	• CHICAGO CORN	BROILERS COST/LB LIVE WEIGHT BASIS FEED	• BROILERS COST PER LB R.T.C. STAT. PHOTO	• QUALITY WT. AVE. PROOF	• ESTIMATED NET WHOLESALE RETURNS TOTAL
	(PER TON)	(PER/BU)				
1ST 1967	• 101.98	1.63	9.6	14.5 28.2	29.2	25.3 -3.9
2ND 1967	• 97.26	1.61	9.5	14.3 19.8	29.0	27.2 -1.3
3RD 1967	• 95.76	1.61	9.2	14.3 19.8	29.0	29.1 0.2
4TH 1967	• 92.76	1.59	9.1	14.1 19.6	29.0	29.6 0.6
1ST 1968	• 92.16	1.58	9.1	14.1 19.6	29.7	25.3 -4.4
2ND 1968	• 90.78	1.57	9.2	14.3 19.8	29.8	29.6 -0.2
3RD 1968	• 97.66	1.61	9.8	14.8 19.5	29.8	27.3 1.8
4TH 1968	• 98.96	1.93	9.8	13.9 19.2	29.3	29.1 -0.2
1ST 1969	• 98.66	1.91	9.8	13.9 19.2	29.2	29.9 +0.3
2ND 1969	• 98.96	1.97	9.9	13.9 19.6	29.6	29.8 +0.2
3RD 1969	• 99.16	1.91	9.1	13.9 19.3	29.6	27.9 +1.4
4TH 1969	• 91.66	1.95	9.9	13.9 19.6	29.9	29.8 +1.8
1ST 1969	• 93.96	1.93	9.9	13.9 19.6	29.9	29.6 -0.3
2ND 1969	• 94.96	1.96	9.9	13.9 19.6	29.9	29.1 -0.8
3RD 1970	• 97.39	1.96	9.9	13.9 19.6	29.9	29.9 0.0
4TH 1970	• 98.96	1.99	9.9	13.9 19.6	29.9	29.9 0.0
1ST 1971	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
2ND 1971	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
3RD 1971	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
4TH 1971	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
1ST 1972	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
2ND 1972	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
3RD 1972	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
4TH 1972	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
1ST 1973	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
2ND 1973	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
3RD 1973	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
4TH 1973	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
1ST 1974	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
2ND 1974	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
3RD 1974	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
4TH 1974	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0

DATE	• SOYBEAN MEAL	• CHICAGO CORN	BROILERS COST/LB LIVE WEIGHT BASIS FEED	• BROILERS COST PER LB R.T.C. STAT. PHOTO	• QUALITY WT. AVE. PROOF	• ESTIMATED NET WHOLESALE RETURNS TOTAL
	(PER TON)	(PER/BU)				
1ST 1967	• 98.12	1.62	9.3	14.4 28.0	29.0	29.2 0.2
2ND 1967	• 94.78	1.60	9.1	14.2 19.7	29.7	25.5 -0.2
3RD 1967	• 98.53	1.95	8.8	13.9 19.3	25.3	25.7 0.4
4TH 1967	• 98.54	1.94	8.5	13.3 18.5	24.5	23.3 -1.2
1ST 1968	• 97.46	1.95	8.3	13.4 18.7	25.2	27.2 2.0
2ND 1968	• 95.94	1.97	8.4	13.6 18.9	25.4	27.7 2.2
3RD 1968	• 105.96	1.98	8.4	13.7 19.1	25.4	28.3 2.7
4TH 1968	• 93.71	1.93	8.2	13.4 18.6	25.2	25.5 0.3
1ST 1969	• 91.34	1.90	8.2	13.6 18.9	25.8	28.1 2.3
2ND 1969	• 98.50	1.96	8.7	14.1 19.6	26.4	29.- 2.6
3RD 1969	• 98.12	1.97	8.7	14.0 19.5	26.4	31.1 4.6
4TH 1969	• 94.20	1.88	8.4	13.5 18.1	26.1	27.4 1.3
1ST 1970	• 102.87	1.96	8.7	14.1 19.6	26.8	27.9 1.1
2ND 1970	• 93.63	1.89	8.6	14.0 19.5	26.7	26.7 0.0
3RD 1970	• 103.16	1.96	8.9	14.7 20.6	27.4	26.0 -1.4
4TH 1970	• 98.84	1.87	8.1	14.5 20.2	27.6	25.0 -2.6
1ST 1971	• 95.48	1.87	8.9	14.6 20.3	27.8	26.9 -1.0
2ND 1971	• 94.38	1.86	8.9	14.6 20.2	27.8	28.2 0.4
3RD 1971	• 98.89	1.91	8.8	13.9 19.3	27.8	28.5 1.0
4TH 1971	• 94.84	1.86	8.1	13.6 18.8	26.2	25.0 -1.2
1ST 1972	• 105.69	1.92	8.4	14.0 19.6	27.7	27.8 0.1
2ND 1972	• 118.18	1.91	8.1	14.4 20.1	28.4	27.2 -1.2
3RD 1972	• 124.97	1.92	8.4	14.9 20.7	29.0	29.6 0.6
4TH 1972	• 158.74	1.80	10.8	16.3 22.6	30.8	28.8 -2.0
1ST 1973	• 236.13	1.89	14.8	19.4 27.6	38.5	37.8 -0.7
2ND 1973	• 258.45	2.14	16.2	24.1 34.8	43.8	42.2 -1.6
3RD 1973	• 222.41	2.01	13.9	20.9 29.1	40.6	39.1 -1.5
4TH 1973	• 202.61	2.01	12.6	21.1 29.4	40.6	37.2 -1.4
1ST 1974	• 184.44	2.11	11.5	22.- 31.7	40.7	39.1 -1.6
2ND 1974	• 132.22	2.73	13.4	19.7 27.8	37.8	35.3 -1.7
3RD 1974	• 165.48	3.41	14.0	23.1 31.8	41.8	37.8 -4.0
4TH 1974	• 178.97	4.48	17.4	23.4 32.6	42.6	40.6 -2.0
1ST 1975	• 187.44	5.19	16.8	21.0 29.7	38.7	41.- 2.3

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DATE	DECATUR SOYBEAN MEAL	CHICAGO NO. 2 CORN	BROILERS COST/LB LIVE WEIGHT BASIS FEED	BROILERS COST PER LB R.T.C. TOT. PROD	BROILERS COST PER LB R.T.C. PROD	U.S. CITY WT. AVG. WHOLESALE TOTAL	ESTIMATED NET RETURNS
	(PER TON)	(PER/BU)					
1967 ...	95.53	1.60	8.9	13.9	19.4	25.6	25.7	-0.2
1968 ...	97.34	1.74	8.4	13.6	18.8	25.4	27.7	1.8
1969 ...	95.86	1.34	8.5	13.9	19.2	26.3	29.2	2.9
1970 ...	99.05	1.48	9.0	14.4	19.9	27.1	26.4	-0.7
1971 ...	95.87	1.40	8.8	14.1	19.4	27.9	27.9	-0.0
1972 ...	126.05	1.48	9.4	14.9	20.1	29.0	28.2	-0.8
1973 ...	178.54	2.91	17.1	22.4	31.8	40.8	42.4	1.6
1974 ...	164.01	3.98	16.8	22.2	30.3	40.3	38.0	-2.3

ROGERS MAY 23, 1975 LETTER

UNITED STATES DEPARTMENT OF AGRICULTURE
ECONOMIC RESEARCH SERVICE
WASHINGTON, D.C. 20250
Commodity Economics Division

May 23, 1975

Mr. Charles S. Stark
Anti-Trust Division
United States Department of Justic
Washington, D.C. 20530

Dear Mr. Stark:

This letter is in response to your telephone request for supplementary information on the investment of broiler growers in buildings and equipment.

The investment costs we obtained in our survey encompassed a mixture of various kinds of housing built at different points in time. Some of these were fully depreciated while others had recently been constructed. Thus, the averages from survey data are much lower than current costs. As of late 1974, current costs were probably up to 30 percent higher in some areas than the survey averages.

Investment costs per bird appear to decline from the Northeast toward the South, mainly because of the differences in predominant types of housing in use. These differences would probably narrow somewhat if relatively more environmentally - controlled houses were built in the South to replace older facilities.

The table below summarized building and equipment costs from our survey. Some examples of what these numbers would mean for selected farm sizes follow. In the South, a grower producing 30,000 birds per batch would have $31,200 invested. In the Northeast, a grower with a capacity of 48,000 birds per batch would have $57,600 invested. These do not include land, other farm equipment, wells, dwellings, etc.

Broiler Grower Investment in Houses and Equipment 1/

Item	Area		
	Maine, Pennsylvania	Delaware, Maryland, Virginia	South 2/
Investment per bird sold			$1.04
Investment per bird capacity	$1.33-1.41 3/	$1.08-1.14 3/	$0.95
Average age of facilities (years)	12.5	13.4	7.2
Square feet per bird when full	.75	.78	0.8

1/ Value of investment for various ages of facilities reported by growers. Based on survey schedules obtained between mid-1972 and mid-1974 by Pennsylvania and Georgia Agricultural Experiment Stations under cooperative agreements with ERS.

2/ Includes Georgia, North Carolina, Alabama, Mississippi, Arkansas, Texas.

3/ First figure excludes housing 20 years or older and equipment 10 years or older which enumerator regarded as fully depreciated. Second figure is grower estimate.

There is, of course, some variation in use of housing capacity. Not all houses are 100 percent full all during the year and the number of batches per year can vary. The pounds produced per house also can vary according to housing types, square feet allowed per bird and average weights grown. It is also difficult to relate investment costs directly to per pound fixed costs because of various rates of depreciation being used.

I trust this information will answer your needs. Again, I had to call on Dr. William Henson at Penn. State and Dr. Harold Jones at Georgia for quick and special analyses of survey data to help develop this response.

I have also sent a copy of this letter to Mr. Michael A. Doyle, attorney for NBMA.

Sincerely,

George B. Rogers/1876

GEORGE B. ROGERS
Program Leader, Poultry

cc: Michael A Doyle.

INFORMATION ABOUT NBMA MEMBERS (GX-1)

Number	Percentage of Broilers Raised By Contract Growers	Number of Growers Remain. At Integrator's Initiative: Total	Inefficiency	Inadequate Facilities	Cutback in # of Growers	Distance From Member's Facilities	Other	Disease	Weather	Provision In Member's Contract Guaranteeing Payment To Grower For Birds That Die As A Result Of Disease Or Weather Conditions	Live Birds Acquired From Sources Other Than Contract Growers
1	100%	23[1]	0	0	23[1]	0	0	No[10]	No[10]	No[10]	50%
2	100%	5	0	0	5	0	0	No	No	No	80%
3	90.5%	2	1	1	0	0	0	No[10]	No[10]	No[10]	40%
4	100%	14	11	2	0	7	1	No	No	No	0
5	97.5%	17	8	8	0	1	0	No[10]	No	No	0
6	100%	9	NA	NA	NA	NA	0	NA	NA	NA	0
7	0	NA	NA	NA	NA	14	0	Yes[5]	Yes[6]	No	0
8	100%	50	24	11	0	0	0	Yes[6]	No[10]	No[10]	20-25%
9	88.0%	40	31	9	0	0	0	No[10]	No	No	0
10	100%	1	0	1	0	0	0	No	No	No	0
11	94.4%	20	19	1	0	0	0	No[10]	No[10]	No[10]	0
12	100%	27	7	2	18	0	0	Yes[10]	Yes[10]	Yes[10]	11-20%
13	100%	127	77	33	17	0	0	No[10]	No[10]	No[10]	10%
14	99.2%	15	5	5	5	2	0	No[9]	No[9]	No[9]	0
15	98.1%	56	51	5	0	7	0	No[10]	No[10]	No[10]	10%
16	85.1%	9	9	0	0	0	0	HR[10]	NR	NR	0
17	100%	15	11	4	0	0	0	No[10]	No[10]	No[10]	11-20%
18	100%	12	10	2	0	4	0	No[10]	No[10]	No[10]	0
19	100%	9[8]	9	0	0	0	0	NR	NR	NR	10%
20	80.0%	0	0	0	0	0	0	NR	NR	NR	0
21	100%	38	34	4	0	0	0	No[10]	No[10]	No[10]	0
22	99.4%	60	46	11	3	12	HR	No[10]	No[10]	No[10]	less than 1%
23	97.5%	NR	NR	NR	NR	HR	HR	HR	HR	HR	less than 1%
24	NR	NR	NR	NR	NA	HR	HR	HR	HR	HR	HR
25	NR	NR	NR	NR	NR	HR	HR	HR	HR	HR	HR
26	0%	NR	NR	NR	NR	HR	HR	HR	NO	NO	HR

Member	Percentage of Broilers Raised By Contract Growers	Number of Growers Terminated At Member's Initiative: Total	Inefficiency	Inadequate Facilities	Cutback In # Of Growers	Distance From Member's Facilities	Other	Provision In Member's Contract Guaranteeing Payment To Grower For Birds That Die As A Result Of Disease Or Weather Conditions: Disease	Weather	Live Birds Acquired From Sources Other Than Contract Growers
27	100%	380	343	63	7	35	32	No[10]	No[10]	-
28	NR	NR	NR	NR	NR	NR	NR	NR	NR	NR
29	100%	33	22	4	0	7	0	No[10]	No	0
30	81.2%	3	0	3	0	0	0[12]	No[10]	No[10]	0
31	100%	20	16	0	0	4	0	No[10]	No[10]	20%
32	100%	226	144	36	46	0	0	No	No	0
33	NR	NR	NR[13]	NR	NR	NR	NR	NR	NR	NR
34	NR	5	5	0	0	0	0	No[10]	No[10]	NR
35	NR	17	10	0	0	1	4[14]	No[10]	No[10]	NR
36	NR	12	NR	NR	NR	NR	NR	No	No	NR
37	100%	13	11	2 or less	0	0	0	No	No	43%
38	98.3%	4	3	0	0	1	0	Yes	No	0
39	100%	24	24	0	0	0	0	No[10]	No[10]	0
40	NR	50	20	30	0	0	0	No	No	NR
41	100%	60[15]	45	13	0	0	0	NR	NR	0
42	100%	207	128	34	45	0	0	No A[16]	No A[16]	less than 1%
43	NR	11	4	6	0	0	1	No[10]	No[10]	NR
44	100%	15	12	0	0	3	0	No	No	less than 2%
45	93.1%	19	14	0	0	2	2	No	No	NA
46	100%	11	10	0	0	1	0	No	No	0
47	99.6%	5	4	1	0	0	0	No[10]	No[10]	0
48	89.4%	0	0	0	0	0	0	No	No	0
49	99.8%	106	102	4	0	0	0	No[10]	No[5]	0
50	100%	28	15	13	0	0	0	No	No[10]	0
51	100%	24	21	3	0	0	0	No[10]	No[10]	0

Member	Percentage of Broilers Raised By Contract Growers	Number of Growers Terminated At Member's Initiative: Total	Inefficiency	Inadequate Facilities	Cutback In # Of Growers	Distance From Member's Facilities	Other	Provision In Member's Contract Guaranteeing Payment To Grower For Birds That Die As A Result Of Disease Or Weather Conditions: Disease	Weather	Live Birds Acquired From Sources Other Than Contract Growers
52	82.7%	25[17]	25	0	0	0	0	No	No	0
53	100%	75	40	20	15	0	0	No	No	0
54	81.0%	26	9	4	0	12	1	No	No	0
55	100%	11	0	0	11[18]	11[18]	0	No[10]	No[10]	0
56	100%	13	6	3	0	0	4	No[10]	No[10]	0
57	100%	34	34	0	0	0	0	Yes[19]	Yes[19]	0
58	83.9%	41[1]	35	6	0	0	0	Yes[19]	No	0
59	95.1%	7	5	0	0	2	0	No[10]	No	0
60	100%	134	52	60	0	22	0	No[B]	No	0
61	100%	15	15	0	0	0	0	No[10]	No[10]	0
62	100%	66	44	7	0	12	3	No	No	0
63	100%	NR	NR	NR	NR	NR	NR	No	No	10%
64	100%	25	13	7	0	5	0	No[10]	No[10]	0

NR (no response from member)

NA (question not applicable to this particular integrator)

A The member firm is organized as a cooperative owned by three distinct corporate members

B The member also owns or controls several affiliated corporations

1. Estimate by member
2. Birds are purchased by co-owned processing plant
3. From outside sources (no explanation). Figure is for 1973
4. Due to uncooperative nature
5. Grower paid $65/1000 on a pro-rata basis for numbers of full weeks the chicks were grown out
6. Grower not paid if negligent
7. low - estimate
   high
8. [illegible] growers terminated for more than one reason
9. Grower paid for live birds delivered. Subsequent condemnation risk borne by integrator
10. Documentation of numbers was different than actual contract term - contract term in response listed
11. Including top 10 [illegible] to build inefficiency and inadequate facilities
12. [illegible] on survey
13. No differentiation between inefficiency and inadequate facilities
14. The 4 under other should be listed under inefficient operations
15. One corporations response to survey question 15(b) lists 37 growers terminated at the member's initiative, but response 16(a-f) lists only 35 growers so terminated
16. Shared if no negligence
17. Response by member to survey question 15(b) lists 20 growers terminated at member's initiative. Responses to questions 16(a-f) indicate 25 is the actual number of growers terminated by the member.
18. 11 terminated due to distance or production cutbacks
19. Shared
20. M-15 and M-20 process their birds through profit-sharing arrangements with the same processing plant. The processor acquires approximately 11% of the broilers it processes from other sources.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,

versus

NATIONAL BROILER MARKETING ASSOCIATION

Civil Action No. 18173

ORDER

This is an action by the United States against the National Broiler Marketing Association (hereinafter referred to as the "NBMA") for an alleged violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Jurisdiction is predicated on 15 U.S.C. § 4. Presently pending are the plaintiff's and defendant's motions for partial summary judgment focusing on the issue of whether NBMA is a cooperative association of agricultural producers exempt from the antitrust laws by virtue of Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, Section 6 of the Clayton Act, 15 U.S.C. § 17 and Section 5 of the Cooperative Marketing Act of 1926, 7 U.S.C. § 455.

The defendant is a non-profit cooperative association, chartered by the State of Georgia since September 15, 1970 under the provisions of the Georgia Cooperative Marketing Act, Ga. Code Ann. §§ 65-201 *et seq.* While NBMA was originally established with capital stock, its articles of incorporation were amended on December 6, 1973 to authorize the conversion of the association to a non-profit membership organization. It is comprised of members that integrate the five stages

of the production of ready-to-cook broilers, including (a) the placement and raising of breeder flocks for the production of eggs for hatching purposes, (b) the hatching of eggs and placement of chicks, (c) the growth of chicks for a period of seven to nine weeks (also referred to as the "grow-out" stage), (d) cooping and hauling of the grown chickens to processing facilities, and (e) the operation of plants to process the broilers for market. All of the member firms, though, do not directly engage in all of these functions. In fact, many conduct one or more of these operations through subsidiaries, affiliated companies, partnerships, joint ventures, or independent contractual arrangements. Usually the chicks are "grown out" through arrangements with independent contractors, known as growers, who provide facilities and certain services necessary for the care of the chickens during this period.

The government contends that this practice of contract growing deprives the NBMA, and its members, of the agricultural exemption under the antitrust laws. The defendant, on the other hand, maintains that despite the arrangements with independent growers, it is entitled to the protection of Section 6 of the Clayton Act, the Capper-Volstead Act and Section 5 of the Cooperative Marketing Act of 1926.

Section 6 of the Clayton Act, 15 U.S.C. § 17, provides that:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

This statute was passed in 1914. Eight years later, Congress enacted the Capper-Volstead Act, 7 U.S.C. § 291, which "was intended to clarify the [Clayton Act's] exemption for agricultural organizations and to extend it to cooperatives having capital stock." *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384, 391 (1967). Therefore, the broad wording of Section 6 of the Clayton Act is limited by the language of the Capper-Volstead Act, and the latter is controlling in describing those entitled to the agricultural exclusion.

7 U.S.C. § 291 states:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however*, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> And in any case to the following:
>
> Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

There is no dispute here that the NBMA is an association operated for the mutual benefit of its members, no member is allowed more than one vote because of the amount of stock or capital owned, and that the association does not pay dividends, stock or membership capital in excess of eight percent per annum. In addition, it is conceded that ready-to-cook broilers are agricultural products. The government and the defendant part company, though, over whether the members are engaged in the production of these products as farmers.[1]

The Capper-Volstead Act does not define the terms "engaged in production" or "farmers". Some assistance, although limited, is provided by the legislative history of this act. As the Supreme Court noted in *Case-Swayne Co., Inc. v. Sunkist Growers, Inc., supra*, at 391:

> The reports on both H.R. 13931, the predecessor bill that failed of passage, and H.R. 2373, which became the Capper-Volstead Act, state:
>
> > Section 1 defines and limits the kind of associations to which the legislation applies. These limitations are aimed to exclude from the benefits of this legislation all but *actual farmers* and all associations not operated for the mutual help of their members *as such producers.*" (Emphasis added.) H.R. Rep. No. 24, 67th Cong. 1st Sess. 1 (1921); H.R. Rep. No. 939, 66th Cong. 2d Sess. 1 (1920).

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[1] The government also denies the NBMA's assertion that the association does "not deal in the products of non-members to an amount greater in value than such as are handled by it for members," as required by the Capper-Volstead Act. The government takes the position that the broilers are not products of the members. This is essentially a restatement of the main argument that the members are not "producers" of agricultural products.

However, the characteristics necessary to qualify as an actual "producer" or "farmer" cannot be adequately discerned from the legislative history.[2]

The government points to subsequent legislation, the Agricultural Fair Practices Act of 1968 (hereinafter referred to as the "Fair Practices Act"), 7 U.S.C. §§ 2301, *et seq.*, as reflecting a congressional design to grant Capper-Volstead immunity to broiler growers only. Portions of the legislative history, especially these excerpts from the Senate Report No. 474, 1968, U.S. Code Cong. & Adm. News, 1867-1874, do indicate that a company contracting with a grower should be considered as a "handler" of agricultural products within the meaning of the Fair Practices Act. However, these references do not demonstrate a clear intent to prevent a "handler" from also qualifying as one "engaged in the production of agricultural products" as a farmer within the meaning of the Capper-Volstead Act.

Even though the legislative background sheds little light on the problem here, guidance is sought from similar situations arising under other statutes. While numerous cases are cited by both parties, the most analogous is *N.L.R.B. v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969). In that case, the United States Fifth Circuit Court of Appeals held that the employer, a poultry farm operator contracting with independent

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[2] The government quotes from various congressional reports and debates but none of these excerpts articulate exactly who is and who is not a farmer. The debates do suggest that a manufacturer which purchased a product grown by a farmer was not intended to be covered by the Capper-Volstead Act since an amendment allowing such an exemption was defeated. See 62 Cong. Rec. 2227-2228, 2275. However, this source does not reveal the intent of Congress concerning those involved in various stages of production in addition to manufacturing or who already own the products and do not purchase from a farmer.

growers to raise chickens, was engaged in farming as the term is used in Section 3(f) of the Fair Labor Standards Act, 29 U.S.C. § 203(f), and that its truck drivers who hauled chickens to market were agricultural employees within the exemption of Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3). In reaching that conclusion, importance was attached to facts that the employer owned the chickens, supplied the feed and several follow-up services, retained the risk of loss throughout the entire process and assumed the hazard of market fluctuation which would affect the price of the birds.

The analysis of another case, *Wirtz v. Tyson's Poultry, Inc.*, 355 F.2d 255 (8th Cir. 1966), cited in *Strain*, is also persuasive. There, the court decided that a corporation engaged in the processing and marketing of eggs was within the agricultural exemption of the Fair Labor Standards Act, 29 U.S.C. § 213, despite the company's practice of procuring eggs from independent contract growers. Essential to this resolution was the finding that the employer was a farmer. *Id.* at 258. The court examined several factors similar to those emphasized in *Strain*, and observed that the employer owned both the chicks and the eggs, supplied the feed and medicine and accepted the risk of loss of the producing stock while the growers provided the premises, labor and equipment in raising the birds. Farming was the business of the corporate employer and its president since "but for their investment and other help, the independent growers would arguably never have raised the egg-producing birds themselves." *Id.* at 260.

While *Strain* and *Tyson's Poultry* do not involve an interpretation of the antitrust exemption, they do look to the total participation of the contractor to determine if that involvement is sufficient to warrant classifying him as a "farmer" or "producer." The task, then, is to examine the facts as they relate

to the ownership of the broilers, the services furnished during the "grow-out" stage and the risks associated with the raising of broilers.

Generally, the NBMA members own the chickens and retain title to them until grown. The government cites the contracts of three members, labelled M-27, M-46 and M-47, claiming that they either have no interest in the chickens or share ownership with the growers. However, M-27 is unique because it, too, is an agricultural co-operative and its members are also the growers. Hence, they and their association would be entitled to the agricultural exemption even under the government's test. The contract of M-46 stipulates that the member and the grower shall have joint title to the poultry but it also provides that upon the contractor's repayment of the loan extended by the Production Credit Association, the chickens become the sole property of the member company. The undisputed affidavit of Ronald W. Cameron, president of M-46, states that this contract provision is used simply for financing purposes. The grower is not required to pay the contractor for the one-half interest in the birds and the risk of loss is borne by the member and not the grower. The agreement between M-47 and its growers does specify that the chicks are sold to the grower, but according to the president of M-47, this is again merely a financing arrangement. The grower pays no cash to M-47 but instead signs a note payable to the contractor who then discounts it with recourse to a local bank or the local Production Credit Association. M-47 never called on a grower to pay a note and has never paid a grower less than the amount of the note.

There is no dispute that the growers furnish the land, buildings and equipment, water, electricity and labor for raising day-old chicks to marketable size and weight. On the other hand, the NBMA members provide the chicks, feed, medicines, vac-

cines and veterinary services. In addition, the members make all decisions with respect to the number and timing of chick placements, the diets and other growing conditions and the age and size at which the broilers shall be marketed. Thus, the division of services supplied by the contractor and grower in the "grow-out" period is very similar to *Strain* and *Tyson's Poultry*.

The members of NBMA also bear substantial risks associated with actual raising of the broilers. The government urges that certain contracts suggest that the grower must pay for broiler losses. These contractual provisions, though, apply in only limited circumstances, for example, where there is loss from theft (M-10), fire resulting from the grower's negligence (M-42) or the use of unauthorized pesticides (M-50). Moreover, the affidavit of Irston R. Barnes, an economic consultant, establishes that, in practice, the members and not the growers run the chance of loss from disease or natural disaster and most make payments to the growers if the flock is lost in transport.[3]

From the standpoint of total investment, the members of the NBMA have a significant stake in producing broilers. It is clear that approximately 90% of the live bird cost is attributable to the input supplied by the members. The government's approach to this investment participation is to emphasize the large contribution of the grower for land, buildings and equipment. Because the grower accepts some uncertainty in the venture does not disprove the substantial investment risks incurred by the members. Additionally, the average costs of the building and land and equipment is only a small part of the total

[3] Many members also pay for losses due to disease and weather. See Table G-2, Affidavit of Irston R. Barnes. The fact that some do not shoulder this burden does not mean that the grower takes the loss. Apparently, the grower in these cases does not receive any compensation for his services, but since the title is in the contractor, the member foregoes not only the potential profits but also must pay for the cost of the bird.

average costs of raising a broiler. See Stipulation. Table attached to Letter of George B. Rogers dated May 9, 1975.[4]

Finally, the member must take much of the risk of the market place. Feed, which accounts for over half of the total costs, is paid for by the contractor. The government points to numerous contracts with provisions tying the grower payments to the cost of feed. However, these agreements do not permit the contractor to pass all of the feed costs and the fluctuations in price on to the grower. Generally, the terms cited merely insert into a formula the costs of feed supplied to a grower. An

[4] This table covers the period of 1972-74 and itemizes the average costs of broiler production in the South and Northeast as follows:

Costs	Average [South] (cents per pound, salable live wt.)	Average [Northeast] (cents per pound, salable live wt.)
Grower:		
Fuel	0.14	0.09
Electricity	0.07	0.10
Litter	0.10	0.03
Hired Labor	0.15	0.19
Miscellaneous	0.19	0.02
Total variable	0.65	0.43
Depreciation	0.43	0.42
Interest	0.32	0.21
Insurance	0.08	0.08
Repairs, maintenance	0.11	0.15
Taxes	0.05	0.10
Total fixed	0.99	0.96
Total grower:	1.64	1.39
Contractor:		
Feed	16.65	16.25
Chicks	2.80	2.77
Grower payment	2.30	2.63
Medication, vaccination	0.24	0.34
Fuel	0.14	0.32
Litter	0.02	0.10
Other	0.32	0.11
Total contractor	22.47	22.52

[All footnotes omitted.]

average cost for all growers is then determined and payments are varied according to deviations from the average. The more efficient grower receives greater income for his efforts.

The member, not the grower, markets the broilers. Since the ready-to-cook broiler market is influenced by weekly price fluctuations, and sometimes subject to wide variation within a year, the members face significant risks in selling their chickens. The government argues, though, that payments to some growers vary with the market price. While this is correct, it proves only that the growers in these circumstances also take some chance of the market place, not that the members face no such risks. Secondly, the hazards for the growers are significantly decreased by minimum payment guarantees in the contracts with the member companies.

In light of these facts, the involvement of the members of the defendant association in the production of the broilers is sufficient to justify their classification as "[p]ersons engaged in the production of agricultural products as farmers . . ." within the meaning of the Capper-Volstead Act and to permit their claim to the antitrust exemption to the extent permitted by that statute.[5]

Accordingly, the defendant's motion for partial summary judgment is granted and the plaintiff's cross-motion for partial summary judgment is denied.

So ordered this the 26 day of August, 1975.

/s ALBERT J. HENDERSON, JR.
Judge, United States District
Court for the Northern
District of Georgia

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[5] Due to the result reached here, it is not necessary to decide whether the NBMA and its members are also entitled to protection of the Co-operative Marketing Act of 1926.

In the United States District Court
For the Northern District of Georgia
Atlanta Division

(Title omitted in printing)

STIPULATION

(Dated February 26, 1976)

The parties, by their respective attorneys, hereby stipulate and agree as follows:

1. Defendant consents to the filing by plaintiff of an amended complaint in the form attached hereto, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.

2. For purposes of all further proceedings in this action, all facts set forth in "Government's Statement of Material Facts," filed June 6, 1975, and in defendant's "Statement of Material Facts Not in Dispute," filed June 20, 1975, are not in dispute.

3. Plaintiff shall not be precluded from filing a separate action at any time based in whole or in part upon those allegations set forth in paragraphs 4, 7 and 10 of its original complaint that are not set forth in its amended complaint, filed pursuant to this stipulation; and defendant waives and relinquishes any defense which might otherwise be asserted in any such separate action based upon the contention that those allegations could have or should have been tried as part of the present action.

Dated: February 26, 1976

/s/ MICHAEL A. DOYLE
Attorney for Defendant

/s/ CHARLES S. STARK
Attorney for Plaintiff

In the United States District Court
For the Northern District of Georgia
Atlanta Division

(Title omitted in printing)

ORDER

The parties hereto acting by and through their respective attorneys having consented, it is hereby ordered that the Amended Complaint annexed hereto be allowed and filed.

This 26th day of February, 1976.

/s/ ALBERT J. HENDERSON, JR., Judge
United States District Court

In the United States District Court
For the Northern District of Georgia
Atlanta Division

(Title omitted in printing)

AMENDED COMPLAINT

(Filed February 26, 1976)

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action against the defendant named herein and complains and alleges as follows:

I

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, commonly known as the Sherman Act, in order to prevent and restrain the violation by the defendant, as hereinafter alleged, of Section 1 of that Act (15 U.S.C. §1).

2. The defendant transacts business and is found within the Northern District of Georgia, Atlanta Division.

II

The Defendant

3. National Broiler Marketing Association (hereinafter referred to as "NBMA"), is made the defendant herein. NBMA is a corporation organized and existing under the laws of the State of Georgia, with its principal place of business in Jackson, Mississippi. It is an association whose members are persons, firms or corporations engaged in the marketing of broilers.

III

Co-Conspirators

4. Each member of NBMA, not made a defendant herein, has participated as a co-conspirator and is a party with the defendant in the combination and conspiracy in violation of Section 1 of the Sherman Act, as hereinafter alleged.

IV

Trade and Commerce

5. Broilers are chickens that have been grown for a period of 8-10 weeks and then slaughtered and processed for sale to customers such as supermarkets, hotels, restaurants and institutions. There are several different grades of broilers; grades less than Grade A are referred to in the industry as undergrades.

6. The production of broilers requires an investment in farm land, buildings and equipment. While historically the production of broilers was carried on by persons who had made this investment, in recent years a substantial part of the production of broilers has been carried on through the use of contract grower arrangements. These arrangements generally provide that the contract grower will raise the broilers from chickens supplied by a processor. While in most cases the processor at all times owns the broilers, the contract grower bears the substantial part of the risk of loss of the investment in the farm land, buildings and equipment needed to produce the broilers. Substantially all of the broilers marketed by members of NBMA are produced for these members by contract growers under arrangements such as those described above.

7. During the period of time covered by this complaint, the members of NBMA have sold and shipped substantial quantities of broilers to customers located in states other than the state in which said broilers were raised and slaughtered, and in other countries. In 1972, broiler slaughter by firms that were NBMA members at the end of the year amounted to more than 4,137,000,000 pounds, or approximately 37% of all broilers slaughtered in federally inspected plants. The activities of NBMA and its members, as described herein, are within the flow of and have an effect upon interstate commerce.

V

Violation Alleged

8. Beginning at least as early as 1970, the exact date being to the plaintiff unknown, and continuing up to and including the date of the filing of this complaint, the defendant and the co-conspirators have been engaged in a combination and conspiracy to fix, maintain and stabilize the price of broilers, in unreasonable restraint of the aforesaid interstate trade and commerce in broilers in violation of Section 1 of the Sherman Act.

Such unlawful combination and conspiracy is continuing and will continue unless the relief hereinafter prayed for is granted.

9. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendant and the co-conspirators, the substantial terms of which have been and are:

(a) to exchange information about past, present and future prices for broilers;

(b) to establish and disseminate a price for broilers;

(c) to sell broilers at or above that price;

(d) to report to NBMA surplus broilers that cannot be sold at that price;

(e) to sell undergrades at agreed on discounts from the Grade A price;

(f) to withhold broiler parts from the market in order to increase their price;

(g) to exchange information about past, present and future production of broilers; and

(h) to sell surplus broilers to customers in foreign countries.

10. For the purpose of effectuating the aforesaid combination and conspiracy the defendant and the co-conspirators have done those things which as hereinbefore alleged they combined and conspired to do.

VI

Effects

11. The aforesaid combination and conspiracy has had the effect, among others, of raising, stabilizing and maintaining the prices of broilers at non-competitive levels.

VII

Prayer

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the defendant and the co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in broilers, as hereinabove alleged, in violation of Section 1 of the Sherman Act.

2. That the defendant and each of its officers, directors, agents, employees, and all persons acting under and through or for defendant be perpetually enjoined and restrained from:

(a) Continuing to carry out, directly or indirectly, the combination and conspiracy hereinbefore alleged, or from engaging in any other combination or conspiracy having a similar purpose or effect, or from adopting or following any practice, plan, program, or device having a similar purpose or effect;

(b) Furnishing to, or requesting from, any processor of broilers, any information concerning prices, terms, or conditions for the sale of broilers; and

(c) Entering into any agreements, arrangements, or understandings with any other persons to eliminate or suppress competition in the sale of broilers.

3. That defendant be ordered to make whatever changes are necessary in its organization and operation to insure compliance with the judgment of this Court.

4. That the plaintiff have such other, further, and different relief as the Court may deem just and proper in the premises.

5. That the plaintiff recover the costs of this suit.

/s/ THOMAS E. KAUPER
Assistant Attorney General

/s/ BADDIA J. RASHID
/s/ GERALD A. CONNELL
/s/ CHARLES S. STARK
/s/ LARRY R. PATTON
/s/ ELLIOT R. WARREN
Attorneys, Department of Justice

(Certificate of Service omitted in printing)

In the United States District Court
For the Northern District of Georgia
Atlanta Division

(Title omitted in printing)

ANSWER TO AMENDED COMPLAINT

(Filed March 9, 1976)

Comes now National Broiler Marketing Association (hereinafter sometimes referred to as "NBMA"), named as defendant in the above-styled action, and files this its Answer to the Amended Complaint:

First Defense

In answer to the allegations of the Amended Complaint, defendant shows to the Court the following facts:

1

Defendant admits that plaintiff, the United States of Amer-

ica, instituted these proceedings under Section 4 of the Sherman Act, but denies that it has violated Section 1 or any other section of that Act. Defendant further denies that the Sherman Act is applicable to it, or to its activities as alleged in the Amended Complaint.

2

Defendant admits the allegations contained in paragraph 2 of the Amended Complaint.

3

Defendant National Broiler Marketing Association admits that it is defendant in this action.. Defendant further shows that it is a non-profit cooperative association of persons engaged in the production of agricultural products, organized, existing and operating pursuant and subject to the Georgia Cooperative Marketing Act, as amended, Ga. Code Ann. § 65-201 *et seq.* Defendant has its principal place of business in Jackson, Mississippi. Its members are individuals, firms, partnerships, corporations and associations engaged in the production and marketing of broilers, an agricultural product. To the extent the allegations of paragraph 3 of the Amended Complaint are inconsistent with the allegations contained in this paragraph 3 of the Answer, they are denied.

4

Defendant denies each and every allegation contained in paragraph 4 of the Amended Complaint. Defendant further shows that neither it nor any of its members has violated Section 1 of the Sherman Act nor participated in any combination or conspiracy in violation of Section 1 of the Sherman Act, as referred to in the Amended Complaint.

5

Defendant admits the allegations contained in paragraph 5 of the Amended Complaint. Defendant shows, however, that the

functions of growing, slaughtering and processing referred to in the first sentence of said paragraph describe only some of the functions necessary to produce broilers.

6

Defendant denies the allegations of paragraph 6 as a whole, because they are over-simplified, and as a consequence they are incomplete, inaccurate, and therefore misleading. Defendant answers the specific sentences of paragraph 6 as follows:

In answer to the first sentence, defendant shows that the production of broilers requires buildings, equipment, feed, vaccines, foundation breeder stock, breeders, medicines, labor, and other inputs, all of which constitute an interlocking system of component parts. None is sufficient without the other.

Defendant denies the second and third sentences of paragraph 6. By way of further answer, defendant shows that in the 1920's and most of the 1930's, poultry sold for meat was primarily an incidental result of keeping laying flocks for egg production. At that time, broilers were typically allowed to range free; their production was accomplished without investment in specialized land, buildings, or equipment. In response to consumer demand, the production of poultry grew from an incidental barnyard operation into a highly efficient industry which now supplies a major source of meat protein to the American consumer. As the volume of broiler production increased, the nature of the interrelationships between various functions in the production of broilers has changed. Presently, an integrated producer will normally direct the separate production functions of a hatchery, numerous satellite hatchery supply flocks, a group of growing facilities, a feed mill, and one or more processing plants. This direction can be effectuated by contract, by common ownership, or by a course of dealing. As a part of this operation, usually a grower under contract to the integrated producer will provide labor and facilities to raise day-

old chicks for eight to ten weeks. The integrator supplies the chicks, feed mixed to his own formula, the vaccine, medications, and also supervises the grow-out process. At the end of the grow-out period, the bird is returned to the integrator for slaughtering, processing, and marketing as a broiler.

Defendant denies the allegations of the fourth sentence of paragraph 6. Defendant admits that under the type of contract grower arrangement alleged by the Amended Complaint, the contract grower bears a part of the risk of production, but defendant shows that the integrated producer of broilers also bears a substantial part of the risk of production, specifically including the marketing risks of price fluctuations, and various forms of losses.

Defendant denies the allegations of the fifth sentence of paragraph 6, but shows that the members of NBMA produce a large part of the broilers they market by the use of a contract grower arrangement as described hereinabove.

7

Defendant admits the allegations of paragraph 7 of the Amended Complaint.

8

Defendant denies each and every allegation contained in paragraph 8 of the Amended Complaint.

9

Defendant denies each and every allegation contained in paragraph 9 of the Amended Complaint (and in each and every subparagraph thereof).

Further answering, defendant shows that it has collected and disseminated pertinent and accurate information concerning the business of broiler production, including the amount of production of broilers, the costs of production, market prices, the supplies of broilers available to be marketed, and other information as to the essential elements of the economics of the broiler business. Neither defendant nor its members has combined, conspired or agreed, directly or indirectly, to lessen production arbitrarily or to raise prices beyond their normal levels, which are set by the individual initiative of the members based on full information.

Defendant further shows that its information and statistics have been made publicly available, to both buyers and sellers, who may apply to those facts their individual intelligence, enlightened by accurate information.

Defendant further shows that a special, necessary and historic practice of the broiler industry is for broilers to be sold by producers on a week-to-week basis, and that this practice, when combined with the extremely perishable nature of the broiler produced, and the necessity for the producer to sell the broiler within an extremely short time span, results in and requires the conclusion that the activities of NBMA are not in restraint of trade as alleged.

10

Defendant denies each and every allegation contained in paragraph 10 of the Amended Complaint.

11

Defendant denies each and every allegation contained in paragraph 11 of the Amended Complaint.

Second Defense

In addition and in the alternative to its other defenses raised herein, defendant shows to the Court the following facts:

Defendant is a non-profit association of persons engaged in the production of agricultural products, which was organized, and is existing and operating pursuant and subject to the

Georgia Cooperative Marketing Act, as amended, Ga. Code Ann. § 65-201 *et seq.* Members of defendant are persons engaged as farmers in the production of agricultural products. Defendant's members act together through defendant in collectively marketing their agricultural products in interstate and foreign commerce, within the intent and meaning of the Act of Congress of February 18, 1922, commonly known as the Capper-Volstead Act (7 U.S.C. § 291). Defendant and its activities are, therefore, exempt from the antitrust laws specifically including Section 1 of the Sherman Act.

Third Defense

In addition and in the alternative to its other defenses raised herein, defendant shows to the Court the following facts:

Defendant and its activities are exempt from the antitrust laws, specifically including Section 1 of the Sherman Act, by virtue of the Act of Congress of July 2, 1926 (7 U.S.C. § 451, *et seq.*) in that defendant's members are persons engaged as original producers of agricultural products, as that term is defined in Section 1 of the Act (7 U.S.C. § 451), who have acted together in the corporate association of defendant NBMA in collectively marketing their products in interstate and foreign commerce.

Fourth Defense

In addition and in the alternative to its other defenses raised herein, defendant shows to the Court the following facts:

The antitrust laws, specifically including Section 1 of the Sherman Act, are inapplicable to defendant and its activities by virtue of the Act of Congress of July 2, 1926 (7 U.S.C. § 451 *et seq.*) in that defendant's members are persons engaged as original producers of agricultural products, as that term is defined in Section 1 of the Act (7 U.S.C. § 451), who have

acted together in the corporate association of defendant NBMA in collectively marketing their products in interstate and foreign commerce.

Fifth Defense

In addition and in the alternative to its other defenses raised herein, defendant shows to the Court the following facts:

The organization, operation, and activities of defendant have been taken pursuant to lawful government programs established for a public purpose, and are the intended result of Congressional and state purpose. This purpose is declared, among other places, in the Capper-Volstead Act, 7 U.S.C. § 291 *et seq.*, the Cooperative Marketing Act, 7 U.S.C. § 451 *et seq.*, the Agricultural Marketing Act of 1946, 7 U.S.C. § 1621 *et seq.*, and the Georgia Cooperative Marketing Act, Ga. Code Ann. § 65-201 *et seq.* Such particularized governmental purpose in the regulation of the field of agricultural marketing has not been, and cannot be, preempted by a general statute of uncertain application like the Sherman Act. As a consequence, therefore, the Sherman Act is inapplicable to the organization, operation, and activities of defendant.

Sixth Defense

In addition and in alternative to its other defenses raised herein, defendant shows to the Court the following facts:

By amendment of its charter effective December 6, 1973, NBMA cancelled all outstanding shares of stock in the Association and converted from a stock cooperative to a non-stock, membership cooperative of agricultural producers. Defendant NBMA is now an agricultural organization, instituted for the purposes of mutual help, and not having capital stock or conducted for profit. Pursuant to the provisions of Section 6 of the Clayton Act, 15 U.S.C. § 17, NBMA and its members are

therefore exempt from the prohibitions of the Sherman Act and other antitrust laws and the said antitrust laws are inapplicable to the conduct of the Association and its members.

Prayer

Wherefore, having fully answered the Complaint, defendant prays as follows:

(a) that the amended complaint be dismissed with prejudice;

(b) that the Court adjudge and decree that defendant is a duly organized cooperative association whose members are producers of agricultural products, entitled to act together in said association pursuant to the Capper-Volstead Act, 7 U.S.C. § 291 *et seq.*, Section 6 of the Clayton Act, 15 U.S.C. §17, and Section 5 of the Cooperative Marketing Act of 1926, 7 U.S.C. §455 and that the activities of defendant and its members as alleged in the Amended Complaint are exempt from the antitrust laws, specifically including Section 1 of the Sherman Act, by virtue of and in accordance with the aforesaid statutes;

(c) that defendant recover the costs of this action from the plaintiff; and

(d) that defendant have such other and further relief as this Court may deem just and proper.

This 5th day of March, 1976.

/s/ SIDNEY O. SMITH, JR.
/s/ MICHAEL A. DOYLE
/s/ FREDERICK H. VON UNWERTH
/s/ PETER KONTIO

Of Counsel:
ALSTON, MILLER & GAINES
1200 C&S National Bank Building
Atlanta, Georgia 30303
(404) 588-0300

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, Plaintiff. v. NATIONAL BROILER MARKETING ASSOCIATION, Defendant.	Civil Action. No. 18173.

ORDER

This is an action for injunctive relief brought by the United States against the National Broiler Marketing Association (hereinafter referred to as "NBMA") for alleged violation of the antitrust laws. Jurisdiction is predicated on 15 U.S.C. § 4, and the amended complaint charges that NBMA has conspired with its members to fix, stabilize and maintain the prices of broiler chickens in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. NBMA has denied the Government's substantive allegations and has further defended by asserting claim to various statutory exemptions from the antitrust laws by virtue of its status as an agricultural cooperative.

In earlier proceedings in this case, plaintiff and defendant each filed motions for partial summary judgment which focused on the issue of whether NBMA is a cooperative association of agricultural producers exempt from the antitrust laws by virtue of Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, Sec-

tion 6 of the Clayton Act, 15 U.S.C. § 17, and Section 5 of the Cooperative Marketing Act of 1926, 7 U.S.C. § 455.

By Order dated August 26, 1975, this Court granted NBMA's motion for partial summary judgment, finding that the involvement of the members of the defendant Association in the production of broilers is sufficient to justify their classification as "[p]ersons engaged in the production of agricultural products as farmers . . ." within the meaning of the Capper-Volstead Act such as to permit their claim to the antitrust exemption to the extent permitted by that statute. That Order did not entirely dispose of this action because plaintiff contended that, even if defendant were an exempt cooperative, the scope of activities protected by the exemption was not as broad as the allegations of the Complaint.

On February 26, 1976, the Government amended its complaint to eliminate those allegations relating to activities which it contended were outside the scope of the exemption. The amended complaint now charges a violation of the Sherman Act by reason of activities all of which plaintiff concedes are within the protection afforded to qualified cooperatives of agricultural producers by the statutory exemptions. Plaintiff does not, of course, concede that defendant is qualified for the exemptions, and on this motion adheres to its earlier argument that defendant's members are not "producers" for purposes of the statutory exemptions because of their use of contract growers in raising broilers to marketable age.

Defendant has answered the amended complaint, and now moves for summary judgment, seeking dismissal of the action and a final judgment declaring defendant to be a duly organized cooperative of agricultural producers entitled to the various exemptions. The Government does not dispute that if NBMA is a qualified cooperative, the exemptions provide a complete defense to the allegations of the amended complaint and the action

must be dismissed. In the August 26, 1975 Order, the Court held that defendant qualifies for the exemption under the Capper-Volstead Act and Section 6 of the Clayton Act.[1] The Court adheres to that finding now. Thus, as a result of the amended pleadings, and in light of this Court's August 26, 1975 Order, the matter is now ripe for the entry of final judgment in defendant's favor.

In the stipulation entered into by the parties and filed in connection with the amended complaint on February 26, 1976, the parties agreed that the facts set forth in the "Government's Statement of Material Facts" filed June 6, 1975 and in defendant's "Statement of Material Facts Not in Dispute" filed June 20, 1975 are not disputed in these proceedings. Both of these statements incorporate references to the record sources underlying each statement of fact, and together they constitute the facts upon which the August 26 Order and the present Order are based. The Court hereby adopts these statements of the material facts, and finds that there is no genuine issue as to any of them.

On the basis of the undisputed facts, and for the reasons stated herein and in the previous Order granting defendant's motion for partial summary judgment, the Court concludes that defendant NBMA is entitled to the judgment it seeks as a matter of law.

Therefore it is Ordered, Adjudged and Decreed that

Defendant National Broiler Marketing Association is declared to be a duly organized cooperative association whose members are producers of agricultural products, entitled to act together in defendant Association pursuant to Section 1 of the Capper-

[1] That Order did not reach the question of whether NBMA and its members are also entitled to protection of the Cooperative Marketing Act of 1926.

Volstead Act, 7 U.S.C. § 291 and Section 6 of the Clayton Act, 15 U.S.C. § 17, and the activities of defendant and its members as alleged in the amended complaint are exempt from the antitrust laws, specifically including Section 1 of the Sherman Act, by virtue of and in accordance with those statutes, and plaintiff's amended complaint is dismissed with prejudice.

Let judgment enter accordingly.

This 16 day of March, 1976.

/s/ ALBERT J. HENDERSON, JR.
ALBERT J. HENDERSON, JR., Judge,
United States District Court for the
Northern District of Georgia

In the United States District Court for the Northern District of Georgia, Atlanta Division

United States of America, Plaintiff, v. National Broiler Marketing Association, Defendant.	Civil Action No. 18173

FINAL JUDGMENT

(Filed March 16, 1976)

This action came on for consideration before the Court, Honorable Albert J. Henderson, Jr., United States District Judge presiding; and the issues having been duly considered and a decision having been duly rendered, granting defendant's Motion for Summary Judgment,

It Is Ordered and Adjudged That:

1. Plaintiff's amended complaint be and it hereby is dismissed with prejudice;

2. Defendant National Broiler Marketing Association be and it hereby is declared and adjudged to be a duly organized cooperative association whose members are producers of agricultural products, entitled to act together in said association pursuant to Section 1 of the Capper-Volstead Act, 7 U.S.C. §291 and Section 6 of the Clayton Act, 15 U.S.C. §17, and the activities of defendant and its members as alleged in the amended complaint are exempt from the antitrust laws, specifically including Section 1 of the Sherman Act, by virtue of and in accordance with the aforementioned statutes; and

3. Defendant National Broiler Marketing Association recover of the plaintiff its costs of this action.

Dated in Atlanta, Georgia, this 16th day of March, 1976.

/s/ LORRAINE NOLTING,
Deputy Clerk
Clerk of the Court
By: Deputy Clerk

Filed and Entered in Clerk's Office This 16th day of March, 1976.

BEN H. CARTER, Clerk

By: LORRAINE NOLTING
Deputy Clerk

(Corrected)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

NATIONAL BROILER MARKETING ASSOCIATION,
Defendant-Appellee.

No. 76-2115.

United States Court of Appeals,
Fifth Circuit.

April 22, 1977.

Government brought antitrust action against association of companies which marketed broiler chickens. The District Court for the Northern District of Georgia, Albert J. Henderson, Jr., Chief Judge, dismissed and Government appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that broiler integrators which performed many of the tasks necessary to bring broiler chickens to consumers but which did not actually grow the chickens, instead contracting that job out to growers, were not "farmers" for purposes of the Capper-Volstead Act exemption from the antitrust laws for farm cooperatives.

Reversed.

1. **Monopolies Key 17(4)**

Even cooperatives which come within the protection of the Capper-Volstead Act do not thereby obtain complete antitrust immunity. Capper-Volstead Act, §§ 1, 2, 7 U.S.C.A. §§ 291, 292.

2. **Statutes Key 188**

Words in statute should be given their ordinary, popular meaning unless Congress clearly meant the words to have some more technical meaning.

3. **Monopolies Key 17(4)**

Broiler integrator companies which had taken on more than one of the tasks necessary to bring broiler chickens to consumers but which had not performed the actual raising of the broiler chicks to maturity, instead allowing that activity to be handled by contract growers who were paid for growing the chickens, title to which remained in the broiler integrators, were not "farmers" for purposes of the Capper-Volstead Act exemption from the antitrust laws for farmers cooperatives. Capper-Volstead Act, §§ 1, 2, 7 U.S.C.A. §§ 291, 292.

See publication Words and Phrases for other judicial constructions and definitions.

4. **Monopolies Key 17(4)**

As used in the Capper-Volstead Act, the term "farmer" still means what it meant in 1922, i.e., one who owns or operates a farm. Capper-Volstead Act, §§ 1, 2, 7 U.S.C.A. §§ 291, 292.

5. **Monopolies Key 17(4)**

Purposes of the Capper-Volstead Act were to improve the bargaining position of farmers vis-a-vis corporate middlemen in order to increase farm income and to stop the rise of tenancy and the migration of farm families to the cities; Congress did not intend that benefits afforded to farmers by the Act be extended to include the corporate entities with which farmers dealt. Capper-Volstead Act, §§ 1, 2, 7 U.S.C.A. §§ 291, 292.

6. **Statutes Key 184**

When a court takes account of changed reality in interpreting statutes, the goal remains effectuation of congressional purpose, not alteration of it.

Appeal from the United States District Court for the Northern District of Georgia.

Before MORGAN and HILL, Circuit Judges, and NOEL,* District Judge.

LEWIS R. MORGAN, Circuit Judge:

We must decide whether broiler industry companies that neither own nor operate farms can be "farmers" within the meaning of a 1922 federal statute called the Capper-Volstead Act,[1] which gives farmers' cooperatives some measure of protection from the antitrust laws. The question is a novel one. After careful study of the Act and its legislative history, we are convinced that Congress's purpose in enacting Capper-

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* Senior District Judge of the Southern District of Texas sitting by designation.

[1] 7 U.S.C. §§ 291-92.

Volstead does not mandate or permit protection of these broiler industry companies from the proscriptions of the antitrust laws. The district court held otherwise, and we reverse.

I. FACTS

A. *The Broiler Industry*

Broilers are young chickens that are slaughtered when seven-to-nine weeks old, then processed and offered for sale ready-to-cook. The broiler industry comprises generally two types of entities—integrator companies and contract growers. The defendant National Broiler Marketing Association (NBMA) is composed of integrator companies.

"Integrators" have that name because over the years they have accomplished what is called the vertical integration of much of the broiler industry. That is, they have taken on more than one of the tasks necessary to bring broilers to consumers. Thus, many NBMA members[2] own and operate not only processing plants, but also feed mills, hatcheries, and breeder flocks (for the production of broiler eggs). Still, most NBMA members are processors, and a few operate only processing plants.

The one major operation not generally performed by the integrator firms is the actual raising of the broiler chicks to maturity. This is handled by farmers called contract growers. These growers raise the chicks on their own farms in their own buildings. They provide their own labor and equipment. The growers also supply the water and electricity needed during the grow-out process, as well as the litter and fuel used in lining and heating the broiler houses. The day-to-day husbandry of the flocks is left to the growers.

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[2] This also includes companies owned by NBMA members or companies commonly owned with NBMA members.

Title to the broiler chicks is retained by the broiler integrators during the grow-out process. The integrators also supply feed and veterinary services. The integrators decide the number and timing of chick placements and the age and size at which the birds will be marketed.

Generally, the growers are treated by the integrators as independent contractors. The contracts provide for a minimum and maximum payment per bird or per pound to the grower.[3]

B. *The Litigation*

The government brought a civil antitrust action[4] against NBMA, alleging that the Association's members and others had combined to fix broiler prices and to restrict broiler production in order to increase broiler prices. After a period of discovery, both parties moved for partial summary judgment on agreed facts. The issue was whether NBMA's members are farmers within the meaning of the Capper-Volstead Act, which states generally that "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers" may engage in certain activities cooperatively.[5]

---

[3] The minimum payment provided in some contracts is less than the cost incurred by the average grower in raising a flock of broilers. Ordinarily, NBMA members are free to lower the payment scale under their contracts with growers before any new flock is grown in response to rising feed costs or falling market prices for broilers. Members are also free to reduce the number of broilers or flocks placed with growers in response to market conditions. Members are usually free to terminate their contracts with growers after any flock and in fact have done so for a variety of reasons.

[4] The action was brought under section 4 of the Sherman Act, 15 U.S.C. § 4, to prevent and restrain alleged violations of section 1 of that Act, 15 U.S.C. § 1.

[5] The full text of the Act is as follows:

§ 291. Authorization of associations; powers

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers

may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such association may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

§ 292. *Monopolizing or restraining trade and unduly enhancing prices prohibited; remedy and procedure*

If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a

[1] The district court held that NBMA's members are farmers as the term is used in the Act and granted NBMA's motion for

certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction, or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

7 U.S.C. §§ 291-92.

Eight years prior to passage of the Capper-Volstead Act, Congress enacted section 6 of the Clayton Act, 15 U.S.C. § 17:

§ 17. *Antitrust laws not applicable to labor organizations*

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

This was the first Congressional action to protect cooperative endeavors from the antitrust laws. Capper-Volstead's effect was "to clarify the exemption for agricultural organizations and to extend it to cooperatives having capital stock." *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 391, 88 S.Ct. 528, 532, 19 L.Ed.2d 621 (1967).

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partial summary judgment.[6] Then the government, with NBMA's acquiescence, filed an amended complaint, deleting all of the allegations that survived the partial summary judgment.[7] The parties stipulated that the government would be allowed to bring a later action reviving those allegations.

The district court granted final judgment in favor of NBMA.[8] and the case is here on the government's appeal of the district court's final order.

II. DISCUSSION

We have noted already that the issue we must decide today is novel. In fact, the Capper-Volstead Act, since its enactment in 1922, has received little attention from the Supreme Court.[9]

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[6] *United States v. National Broiler Marketing Ass'n*, 1975—2 CCH Trade Cases ¶ 60,509 (N.D.Ga. Aug. 26, 1975).

[7] Even cooperatives that come within the protection of Capper-Volstead do not thereby obtain complete antitrust immunity. *See Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960); *United States v. Borden Co.*, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939).

[8] *United States v. National Broiler Marketing Ass'n*, 1976—1 CCH Trade Cases ¶ 60,801 (N.D.Ga. Mar. 16, 1976).

[9] The Supreme Court's most recent decision interpreting Capper-Volstead is *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967), in which the Court held that the Sunkist cooperative could not qualify for the exemption because some of its members were packing houses that contracted with fruit growers to handle the growers' fruit for cost plus a fixed fee. 389 U.S. at 387, 88 S.Ct. 528. The Supreme Court in *Case-Swayne* emphasized that the legislative history of Capper-Volstead made clear Congress's purpose to limit the shelter of the Act to actual growers. *Id.* at 391-93, 88 S.Ct. 528. Thus, the Court concluded that "Congress did not intend to allow an organization with such nonproducer interests [*i.e.*, the packing houses] to avail itself of the Capper-Volstead exemption." *Id.* at 395-96, 88 S.Ct. at 535.

The instant case is a logical successor to *Case-Swayne*. In *Case-Swayne*, the Supreme Court had little difficulty concluding that the packing houses were not farmers. Here, entities somewhat analogous to the packing houses, broiler integrators, assert that they are farmers for the reasons stated in the text *infra*.

Moreover, no significant body of Capper-Volstead law has developed in the lower federal courts.[10] And the legal commentary has not been abundant.[11]

The remaining Supreme Court decisions about Capper-Volstead are *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed.2d 305 (1962) (several cooperatives may join together as one organization without losing Capper-Volstead protection); *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960) (Capper-Volstead not a license for farmers' cooperatives to engage in predatory practices otherwise violative of section 2 of Sherman Act); and *United States v. Borden Co.*, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939) (cooperative's combination with nonproducers not protected by Capper-Volstead; Capper-Volstead section 2 not exclusive remedy for cooperatives's anti-competitive conduct).

See also Tigner v. Texas, 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124 (1940) (state antitrust law that exempts agriculture enterprises does not violate federal Constitution); *Frost v. Corporation Commission*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929) (Brandeis, J., dissenting) (discussion of cooperative movement); *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-operative Marketing Ass'n*, 276 U.S. 71, 48 S.Ct. 291, 72 L.Ed. 473 (1928) (statute making illegal the witting interference with contract between farmer and cooperative not violative of federal Constitution).

[10] The court of appeals and district court decisions treating Capper-Volstead either reached the Supreme Court, *see* note 9 *supra*, or are fairly routine applications of the principles announced in the Supreme Court opinions, *e. g.*, *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976) (applying *Borden* and *Maryland & Virginia Milk Producers*); *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999, 95 S.Ct. 314, 42 L.Ed.2d 273 (1974) (potato marketing associations' activities qualified as marketing within the meaning of CapperVolstead); *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), *cert. denied*, 382 U.S. 977, 86 S.Ct. 545, 15 L.Ed.2d 468 (1966) (applying *Maryland & Virginia Milk Producers*); *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, 413 F.Supp. 984 (N.D.Cal. 1976) (Capper-Volstead protects price-fixing by cooperative even when not incident to other collective activity); *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 355 F. Supp. 408 (D.C.Cal. 1971) (restructured Sunkist comes within Capper-Volstead).

[11] *See generally, e. g.*, J. von Kalinowski, 16F Business Organizations (Antitrust Laws & Trade Regulation) §§ 51.01 to -.06 (1976); Hanna, *Antitrust Immunities of Cooperative Associations*, 13 Law &

The positions of the parties may be stated briefly. The government contends that Congress clearly meant to limit the benefits of the Capper-Volstead Act to persons that own or operate farms. The government argues that this interpretation comports with the ordinary meaning of the word "farmers" and with the central themes of the legislative history of the Act. The record reflects and NBMA concedes that some of its members neither own nor operate any farms on which broilers are raised to maturity.

NBMA counters that "farmers" ought to be read "in a realistically broad sense."[12] Deemphasizing "farmers," but clearly aware that the term "farmers" is the slipper that must fit the foot, NBMA argues that Congress intended to afford Capper-Volstead's protection "to all persons actually engaged in the production of agricultural products."[13] NBMA urges that its members are so engaged principally because they own the chicks, furnish the feed, and share in the risks that attend broiler production.

Contemp. Prob. 488 (1948); Hufstedler, *A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed*, 22 Admin.L.Rev. 455 (1969-70); *Lemon, The Capper-Volstead Act—Will It Ever Grow Up*, 22 Admin.L.Rev. 433 (1969-70); Mahaffie, *Cooperative Exemptions Under the Antitrust Laws: A Prosecutor's View*, 22 Admin.L.Rev. — (1969-70); Mischler, *Agricultural Cooperative Law*, 30 Rocky Mtn.L.Rev. 381 (1958); Noakes, *Exemption for Cooperatives*, 19 ABA Antitrust Section 407 (1961); Pogue, *The Rationale of Exemptions from Antitrust*, 19 ABA Antitrust Section 313 (1961); Saunders, *The Status of Agricultural Cooperatives Under the Anti-Trust Laws*, 20 Fed.B.J. 35 (1960).

[12] Brief for NBMA at 42. *But see Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967). In Case-Swayne, the Supreme Court characterized Capper-Volstead as constituting "special exceptions to a general legislative plan," *id.* at 393, 88 S.Ct. at 533 and further spoke of the Act as a "limited" exemption, *id.* at 391 n. 8, 88 S.Ct. 528.

[13] Brief for NBMA at 22.

Neither of the interpretations seems on its face wholly irrational. Our task is to decide which of the two is the more congenial to the language and purpose of Capper-Volstead.

A. *The Words Congress Used*

We begin with the words of the statute.[14] Congress granted a measure of protection from the antitrust laws to "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers . . .". NBMA focuses on the first part of the clause—persons engaged in the production of agricultural products—as the key to the Act's coverage. It seems clear, however, that the universe of persons engaged in the production of agricultural products can be larger than the universe of those so engaged as farmers, planters, ranchmen, dairymen, nut or fruit growers.[15] The test, then, is whether broiler integrator firms are *farmers*.

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[14] *Dupuy v. Dupuy*, 511 F.2d 641, 642 (5th Cir. 1975).

[15] The legislative history of Capper-Volstead, discussed *infra*, shows a genuine Congressional concern that the statute not be as broad as a liberal construction of "production" might allow. In *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967), the Supreme Court noted this concern, quoting from a floor debate exchange involving Senator Kellogg, a principal sponsor of the measure:

> "Mr. CUMMINS . . . . Are the words 'as farms, planters, ranchmen, dairymen, nut or fruit growers' used to exclude all others who may be engaged in the production of agricultural products, or are those words merely descriptive of the general subject?
>
> "Mr. KELLOGG. I think they are descriptive of the general subject. I think 'farmers' would have covered them all.
>
> "Mr. CUMMINS. I think the Senator does not exactly catch my point. Take the flouring mills of Minneapolis: They are engaged, in a broad sense, in the production of an agricultural product. The packers are engaged, in a broad sense, in the production of an agricultural product. The Senator does not intend

[2] What meaning are we to place on the word "farmers"? It is long settled that words in statutes should be given their ordinary, popular meaning unless Congress clearly meant the words in some more technical sense.[16] Mr. Justice Frankfurter stated the point well:

> [L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 618, 64 S.Ct. 1215, 1221, 88 L.Ed. 1488 (1944). Of course we cannot take a poll to determine the ordinary, popular meaning of the word "farmers." And our confidence in the dictionary for this purpose is not great.[17] We are left to our judgment, informed by the whole of our experience.

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by this bill to confer upon them the privileges which the bill grants, I assume?

"Mr. KELLOGG. Certainly not; and I do not think a proper construction of the bill grants them any such privileges. The bill covers farmers, people who produce farm products of all kinds, and out of precaution the descriptive words were added.

"Mr. TOWNSEND. They must be persons who produce these things.

"Mr. KELLOGG. Yes; that has always been the understanding."

389 U.S. at 392, 88 S.Ct. at 533, *quoting* 62 Cong.Rec. 2052 (1922).

[16] *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968); *Malat v. Riddell*, 383 U.S. 569, 86 S.Ct. 1030, 16 L.Ed.2d 102 (1966).

[17] The relevant definitions of the word "farmer" in *Webster's Third New International Dictionary* (1964) include "a person who cultivates land or crops or raises livestock," "one that rents or leases land for cultivation," and "a person whose primary occupation is the raising of crops or livestock." *Id.* at 824.

[3] We cannot conceive that the ordinary, popular sense of the word "farmers" would fit broiler integrator companies. The husbandry of the broiler flocks is carried out neither by these firms nor by their employees, but by the contract growers. The farms where the husbandry is done are owned not by NBMA members or their employees, but by these growers. Whatever else farming may mean, an irreducible minimum must be either husbandry of animals or crops or farm ownership. Given the absence of both of these elements here, none of the factors suggested by NBMA as indicative of farming nor all of the factors together would seem a sufficient shoe horn to squeeze these companies into farmers' boots. Asked to examine the broiler business and to identify the "farmers," Justice Frankfurter's common run of men, we think, would point to the contract growers —the persons who own and operate the farms—as the "farmers."

[4] NBMA cautions us against a romantic view of agriculture and points out that agriculture has changed greatly from the Jeffersonian conception of the self-sufficient yeoman. We agree that agriculture has changed much. But the ordinary, popular meaning of the word "farmer" has not. When the common run of people wish to speak of the broader spectrum of modern agriculture, the word generally used is "agribusiness." "Farmer" still means what it meant in 1922—one who owns or operates a farm.

Mr. Justice Holmes observed once that "the meaning of a sentence is to be felt rather than to be proved . . .". *United States v. Johnson*, 221 U.S. 488, 496, 31 S.Ct. 627, 55 L.Ed. 823 (1911). We believe the Capper-Volstead Act, with its listing of beneficiaries—farmers, planters, ranchmen, dairymen, nut or fruit growers—has a feeling, a cadence of meaning, that has no place for NBMA's member companies.

B. *The Legislative History*

Our examination of the legislative history of Capper-Volstead has only reinforced our conviction that Congress meant "farmers" to be read in its ordinary sense, as urged by the government, rather than in an imaginative, broad sense, as urged by NBMA.

[5] The Act's legislative history carries two dominant themes. Congress meant to improve the bargaining position of farmers vis-a-vis corporate middlemen in order to increase farm income and, importantly, to stop the rise of tenancy and the migration of farm families to the cities. Second, Congress was convinced that the benefits afforded to farmers by Capper-Volstead should not be extended to include the corporate entities with which farmers dealt.

The Congressional concern for the weak bargaining position of the individual farmer was emphasized in the House Report:

> Whenever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself with his neighbors for the purpose of collectively negotiating for a fair price he is threatened with prosecution.[18]

This point was reiterated in the upper chamber's debates. Senator Kellogg, the floor manager of the legislation, spoke of the farmer as "a small holder of land" whose "means and . . . opportunities are not sufficient to allow him to take any steps whatever in placing his products with the ultimate consumer or, usually, with the middleman."[19] Thus, Congress's purpose in enacting Capper-Volstead was, as Mr. Justice Black observed, to give "individual farmers . . . through agricultural cooperatives

[18] H.R.Rep.No.24, 67th Cong., 1st Sess. 2 (1921).

[19] 62 Cong.Rec. 2050 (1922).

acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities." *Maryland & Virginia Milk Producers Association v. United States*, 362 U.S. 458, 466, 80 S.Ct. 847, 853, 4 L.Ed.2d 880 (1969).

NBMA suggests that the purpose of Capper-Volstead was to make farming reliably profitable and to assure the nation a stable supply of wholesome food. This characterization is incomplete and therefore misleading. Congress meant to make farming reliably profitable in order to insure the occupational survival of small scale agriculturalists who were "widely scattered and inured to habits of individualism . . .".[20] By 1922 farming's unprofitability had sent thousands of farmers to the cities to find work.[21] Congress feared that the system of small, individually owned farms would be unable to survive. Senator Kellogg stated this apprehension during the floor debates: "In my opinion, the greatest concern confronting the statesmen of the country is the tendency to drift to the cities, the decline of agriculture, the increase of landlordism and tenancy."[22] Senator Capper reiterated the point:

[20] The quoted language is from *Tigner v. Texas*, 310 U.S. 141, 145, 60 S.Ct. 879, 881, 84 L.Ed. 1124 (1940) (Frankfurter, J.).

[21] *See* 62 Cong.Rec. 2218 (1922) (remarks of Sen. Calder).

[22] 62 Cong.Rec. 2051 (1922).

In the 1955 report of the Attorney General's National Committee to Study the Antitrust Laws, the chief reasons for protection of certain agricultural activities from the antitrust laws were listed. First among these was "preservation of the family farm as the primary unit of agricultural production." The report also listed assurance of an adequate supply of agricultural products and "the need for offsetting the weakness of the individual farmer faced with greater bargaining power in the markets where he buys and sells." J. von Kalinowski, 16F Business Organizations (Antitrust Laws and Trade Regulation § 51.01[1], at 51-3 n. 3 (1976)), *quoting* Att'y Gen. Rep. 306 (1955).

> During the last decade of the 19th century and the early decades of the 20th, mortgage indebtedness rose sharply, and

> Mr. President, every statesman looks forward to a condition as ideal when the whole country will be dotted with small farms, each operated by its owner. Every statesman deplores the spread of tenantry and insists that best citizenship can be developed only upon the individual system of farm production. Because of his peculiar characteristic of agriculture, the growers have never been able to adopt a corporate form of organization; they have, therefore, gradually fitted into the cooperative form of organization, which maintains individuality of production but enables them to unite for marketing purposes.[23]

Cooperation among farmers thus was seen as the best solution to the farmers problems because it allowed them to band together without sacrificing their social and economic individualism. The House Report, for example, rejected the corporate mechanism as the farmers' redemption:

> It is no answer that farmers may acquire the status and secure the rights of a business corporation by deeding their farms to a corporation. That is neither practical nor desirable from any standpoint.[24]

Senator Kellogg agreed:

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there was a dramatic growth in the amount of farm tenancy in the country. By the end of the 1920s, a large percentage of the nation's farmers no longer owned the land they worked. Tenancy rates were exceptionally high in the specialized cash-crop areas of the country. In the eastern and western Cotton Belts, over two-thirds of all farmers were tenants, and in the wheat and corn belts, approximately two-fifths farmed land they did not own.

Conrat & Conrat, How U.S. Farmers Became Specialists—in Cash and Debts, *Smithsonian* 54 (Mar. 1977).

[23] 62 Cong.Rec. 2058 (1922).

[24] H.R.Rep.No.24, 67th Cong., 1st Sess. 2 (1921).

> Mr. President, of course, the farmer can not consolidate his land into great holdings or into corporate ownership, and he should not do so. The hope of this Nation, the hope of any nation, the hope of the independence and the prosperity of our people, our very civilization, depends upon the individual ownership and proprietorship of the soil.[25]

A corollary to Congress's purpose to strengthen the position of farmers vis-a-vis middlemen was Congress's resolve to leave fully subject to the antitrust laws those companies with which farmers dealt. For example, the Senate rejected[26] an amendment[27] proposed by Senator Phipps that would have extended the shelter of Capper-Volstead to companies such as sugar refineries that entered into pre-planting contracts with farmers. Senator Phipps's proposal generated this exchange on the floor:

> Mr. KELLOGG. Mr. President, I hope this amendment will not be adopted. It permits any manufacturer who converts a product into a finished commodity where the price paid by the manufacturer to the producer is controlled by or dependent upon the price received by the manufacturer for the finished product to enter into any combination he sees fit. *Of course, if they make contracts with the producers of the raw materials, the packers, the sugar manu-*

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[25] 62 Cong.Rec. 2051 (1922).

[26] 62 Cong.Rec. 2275 (1922).

[27] The amendment would have inserted the following language after "nut or fruit growers":

> and where any such agricultural product or products must be submitted to a manufacturing process, in order to convert it or them into a finished commodity, and the price paid by the manufacturer to the producer thereof is controlled by or dependent upon the price received by the manufacturer for the finished commodity by contract entered into before the production of such agricultural product or products, then any such manufacturers may.

62 Cong.Rec. 2273 (1922).

facturers, or anybody manufacturing anything where the raw product is produced on the farms can combine under this bill.

If the Senate wishes absolutely to defeat the bill, it ought to adopt this amendment; otherwise not.

Mr. PHIPPS. Mr. President, will the Senator yield?

Mr. KELLOGG. I yield.

Mr. PHIPPS. I desire to call attention to the fact that this amendment is limited to cases where the manufacturer enters into a contract with the producer before the produce has been grown.

Mr. KELLOGG. I can answer that. That is perfectly easy to do. *The packers could enter into contracts, the cotton mills could enter into contracts; and I hope the Senate will defeat the amendment.*[28]

Although we concede that there are differences between the contractual arrangement prevalent in the broiler industry and the arrangements that would have been covered by the Phipps Amendment, we are convinced that the nature of the opposition to that Amendment is instructive here as evidence that the Capper-Volstead Congress would not have considered NBMA integrators "farmers," but instead would have grouped them with the packers, the cotton mills, and the sugar refineries.

Congress's determination to circumscribe carefully the coverage of the Act is reflected in other parts of the legislative history as well. For example, the House Report stated:

> Section 1 defines and limits the kind of associations to which the legislation applies. These limitations are aimed

[28] 62 Cong.Rec. 2274 (1922) (emphasis added).

> to exclude from the benefits of this legislation all but actual farmers . . .[29].

Reading "farmers" in its ordinary sense as meaning those who own or operate farms focuses the benefits of the Act more closely on the persons central to Congress's concern and it keeps subject to the antitrust laws those companies that prepare farm products for market.

C. *The Fabric of Other Law*

The language and legislative history of Capper-Volstead support the government's position. NBMA contends, however, that the government's reading of "farmers" is at odds with the treatment of broiler integrators and similar entities under other statutes and regulations.[30] The contention is unavailing. First, broiler integrators and like companies have not fared nearly so well under other statutory schemes as the NBMA contention suggests.[31] Second, none of the other statutes or regulations

[29] H.R.Rep.No.24, 67th Cong., 1st Sess. 1 (1921). And see note 15 *supra*.

[30] Representative of the decisions cited by NBMA are *NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969) (Fair Labor Standards Act); *United States v. Chemell*, 243 F.2d 944 (5th Cir. 1957) (Treasury Regulations); and *Agricultural Transport Ass'n v. United States*, 274 F.Supp. 528 (N.D.Tex.1967) (Interstate Commerce Act). NBMA also mentions a decision of the New Orleans Bank for Cooperatives to extend credit, Brief for NBMA at 47; a decision of the Secretary of Agriculture regarding a turkey marketing order, 27 Fed.Reg. 3326-54 (1962); a Cost of Living Council Decision, Brief for NBMA at 50; and a recent state court decision in Maine, *Maine Agricultural Marketing Ass'n v. Maplewood Poultry Co.*, Civ.No. 559 (Super.Ct.Me., Kennebec SS. 1971).

[31] In addition to the Fair Labor Standards Act decisions cited in the text, *infra*, *see, e.g., Parks v. Federal Crop Ins. Corp.*, 416 F. 2d 833 (7th Cir. 1969); *United States v. Elm Spring Farm, Inc.*, 38 F.Supp. 508 (D.Mass. 1941), *modified on other grounds*, 127 F.2d 920 (1st Cir. 1942).

mentioned by NBMA involves the important national commitment to free competition embodied in the antitrust laws.[32] We are wary of transplanting results from one statutory scheme to another, because policies may vary, and even where policies seem the same, different countervailing interests may affect the extent to which Congress intends to effectuate the policies.[33]

NBMA relies heavily on results under the Fair Labor Standards Act (FLSA)[34] and stresses particularly a panel decision of this court, *NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969). In *Strain*, we held that a broiler integrator was a raiser of poultry within the meaning of the agricultural exemption in the FLSA.[35] The *Strain* decision is no longer good law. In *Bayside Enterprises, Inc. v. NLRB*, — U.S. —, 97 S.Ct. 576, 50 L.Ed.2d 494 (1977), the Supreme Court held that the National Labor Relations Board's position on the issue must be sustained. The NLRB squarely and consistently has held:

> when an employer contracts with independent growers for the care and feeding of the employer's chicks, the em-

[32] *See e. g., Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967).

[33] *See United States v. Sisson*, 399 U.S. 267, 297-98, 90 S.Ct. 2117, 26 L.Ed.2d 608 (1970); *United States v. Stewart*, 311 U.S. 60, 69, 61 S.Ct. 102, 85 L.Ed. 40 (1940); *Lane v. Railroad Retirement Bd.*, 185 F.2d 819, 822 (6th Cir. 1950). In *FTC v. Bunte Bros.*, 312 U.S. 349, 61 S.Ct. 580, 85 L.Ed. 881 (1941), the Court stated:

> Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business. The Interstate Commerce Act and the Federal Trade Commission Act are widely disparate in their historic settings, in the enterprises which they affect, in the range of control they exercise, and in the relation of these controls to the functioning of the federal system.

Id. at 353, 61 S.Ct. at 582.

[34] 29 U.S.C. § 201 *et seq.*

[35] 29 U.S.C. § 203(f).

> ployer's status as a farmer engaged in raising poultry ends with respect to those chicks.

Imco Poultry, Division of International Multifoods Corp., 202 N.L.R.B. 259, 260 (1973). Thus, the government's interpretation of Capper-Volstead is consistent with the treatment accorded broiler integrators by the NLRB.

The Secretary of Labor long has held that employees of broiler integrators are not agricultural employees within the meaning of FLSA. A Labor Department regulation states:

> Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees are clearly within section 3(f). The activities of the feed dealer or processor, on the other hand, are not 'raising of poultry' and employees engaged in them cannot be considered agricultural employees on that ground.[36]

We note these results under the labor laws because they show at least that the government's position is no aberration. To be sure, integrators have had some success in pressing their claim to be farmers.[37] It is sufficient answer that we find nothing in these results under different schemes that compels an interpretation of Capper-Volstead that is contrary to the interpretation suggested by the language and legislative history of the Act. Blind obeisance to consistency is no virtue if it takes us from our pri-

[36] 29 C.F.R. § 780.126.

[37] *See* note 30 *supra*.

mary duty to work the will of the elected representatives of the people, and such obeisance would be strange indeed here, as there is no real consistency to obey.

III. CONCLUSION

NBMA's position that the Capper-Volstead Act should be brought up to date to take account of the complex structure of modern agriculture[38] rests on fundamental misconceptions of the Congressional purpose revealed in the language and legislative history of the Act and of the role of the judiciary in a democratic society.

The language and legislative history of Capper-Volstead make quite clear that Congress had no purpose to shelter from the laws of free competition the whole spectrum of agricultural enterprise. We may be certain that even in 1922 the agricultural economy had begun to evolve into the intricate thing it now is, yet Congress carefully limited the benefits of the Act to "farmers," and the legislative history reinforces our inclination to give the word its ordinary meaning.

[6] When a court takes account of changed reality in interpreting statutes, the goal remains effectuation of Congressional purpose, not alteration of it. If there are good reasons why broiler integrators should be protected against the general national policy of free competition, then NBMA should present those reasons to Congress.[39]

REVERSED

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[38] Brief for NBMA at 26, 31.

[39] Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive.

Addision v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 617, 64 S.Ct. 1215, 1221, 88 L.Ed. 1488 (1944).

United States Court of Appeals
For the Fifth Circuit

No. 76-2115

D. C. Docket No. CA18173

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

NATIONAL BROILER ASSOCIATION,
Defendant-Appellee.

Appeal from the United States District Court for the
NORTHERN DISTRICT OF GEORGIA

Before MORGAN and HILL, Circuit Judges, and NOEL,* District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

April 22, 1977

Issued as Mandate: